No. 89-961

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

EDWARD LaMON AND LORRAINE LaMON,

Petitioners,

v.

CITY OF WESTPORT, A MUNICIPAL CORPORATION; BILL WADE, JR., AND JANE DOE WADE, HIS WIFE; ORVILLE ENGLE AND JANE DOE ENGLE, HIS WIFE; FRANK SCHNIDER AND JANE DOE SCHNIDER, HIS WIFE; GARY PEDERSEN and JANE DOE PEDERSEN, HIS WIFE; CHERYL AHERN AND JOHN DOE AHERN, HER HUSBAND; GLEYN BLEDSOE AND JANE DOE BLEDSOE, HIS WIFE; AND JOHN J. REGAN AND MABEL REGAN, HIS WIFE;

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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September 1, 1989

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QUESTIONS PRESENTED

I. Does the Fourteenth Amendment to the United States Constitution provide procedural and/or substantive due process protection for a person's "good name and reputation" from the intentional dissemination of false and private information by the placing of such material in the City Library by the municipal corporation?

II. Does the Fourteenth Amendment to the United States Constitution protect a litigant in State Court on both the trial and appellate level from arbitrary adjudicative procedures?

III. Was petitioner deprived of a constitutionally protected right of privacy when the City of Westport placed defamatory and private material concerning them in the Westport City Library?

PARTIES

The parties to this case, as defined by Rule 19.6, are the petitioners Edward LaMon and Lorraine LaMon.

The respondents are City of Westport, a municipal corporation, Bill Wade, Jr. and Jane Doe Wade, his wife, Orville Engle and Jane Doe Engle, his wife, Frank Schnider and Jane Doe Schnider, his wife, Gary Pedersen and Jane Doe Pedersen, his wife, Cheryl Ahern and John Doe Ahern, her husband, Gleyn Bledsoe and Jane Doe Bledsoe, his wife, and John J. Regan and Mabel Regan, his wife. With the exception of John J. Regan, who was police chief, the spouses first named were members of the city council of the City of Westport, and authorized and required the taking of the action by the city complained of.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The petitioners Edward LaMon and Lorraine LaMon respectfully petition the Court for a Writ of Certiorari to review the decisions of the Court of Appeals of the State of Washington, Division II and the Washington State Supreme Court.

OPINIONS BELOW

The opinion of the Washington State Court of Appeals, 44 Wn. App. 664, 723 P.2d 470 (1986) is reproduced in Appendix A, App. 1-9 inclusive. The order changing the opinion of the Washington State Court of Appeals is found in Appendix B, App. 10-11.

The order (letter) of the Washington State Supreme Court denying the Petition for Review is reproduced in Appendix C, App. 12.

The decision of the trial court, granting defendants' Motion for Summary Judgment, is reproduced in Appendix D, App. 85. The order of the trial court denying defendants' first Motion for Summary Judgment is reproduced in Appendix E, App. 88. The order granting summary judgment is in Appendix D, App. 86-87.

Other decisions relevant to this petition are included in Appendix C, App. 13-25 inclusive, *LaMon vs. Butler*, 44 Wn. App. 654, 722 P.2d 1373 (1986); Appendix C, App. 54-84, *LaMon vs. Butler*, 110 Wn.2d 216, 751 P.2d 842 (1988); and Appendix C, App. 25-54, *LaMon vs. Butler*, 112 Wn.2d 193 (1989).

JURISDICTION

The judgment of the Washington State Court of Appeals, Division II, was entered on July 31, 1986, which decision affirmed the trial court's Order Granting Summary Judgment against petitioners' claim of defamation and invasion of privacy which order was entered January 9, 1984. An order changing the opinion of the Washington State Court of Appeals was entered August 28, 1986. On

June 6, 1989, the Supreme Court of Washington entered its order denying the Petition for Review. The jurisdiction of this court is invoked under 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petition for Certiorari is based upon the Seventh Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution.

> The Seventh Amendment provides in pertinent part:
>
> > In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment due process clause provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

RULE 21.1(h) Statement

The Seventh Amendment right to a jury trial was raised in petitioners' Petition for Review to the Washington State Supreme Court. Appendix F, App. 89-95.

The Fourteenth Amendment due process clause was raised in the Motion to Reconsider to the Court of Appeals. Appendix G, App. 96-99. It was also raised in

the Petition for Review to the Washington State Supreme Court. Appendix F, App. 89-95 inclusive.

STATEMENT OF THE CASE

The petitioners, Edward LaMon and Lorraine LaMon, husband and wife, as business owners in the City of Westport, Washington had successfully sued Westport Police Chief John Regan in Federal Court for a violation of their civil rights. Findings of Fact, Appendix H, App. 100.

The problems between petitioners, and the City of Westport, and its Police Chief, began in 1972 when after the petitioners complained to the police about a drunken customer, they ended up being arrested and accused of Assault. Mrs. LaMon was convicted in the municipal court of Assault, Mr. LaMon was acquitted, and upon appeal Mrs. LaMon's conviction was set aside.

After the judgment against Police Chief Regan was entered by the Federal Court, Police Chief Regan appealed the judgment, and asked that the Westport City Council put up a supersedeas bond on his behalf.

A petition was circulated asking for support for Chief Regan's requests. In that petition the petitioners herein were ridiculed. A copy of that petition is attached hereto as Appendix I, App. 104. This petition was circulated by a citizen by the name of Lynn Trotter, and Councilman Gleyn Bledsoe one of the defendants in this action.

Since 1969, the Police Chief John Regan had intentionally, and maliciously denied the petitioners equal

protection of the law at their place of business. The City consistently took the position that the judgment rendered against Police Chief John Regan was based upon false arrest, when in fact it was based upon denial of equal protection of the law.

The Westport City Council, at its September 24, 1979 meeting, directed that copies of the documents which pertained to the case be placed in the City Library. Appendix J, App. 106. On September 25, 1979, without any notice to Mrs. LaMon, the city clerk placed the offensive material in the Westport City Library. See Appendix K, App. 110. No opportunity was given petitioners to object to the placing of such material in the library, or to review which documents should or should not be placed in the library. Neither the City Council nor its attorney reviewed the documents before they were placed in the library. Mr. and Mrs. LaMon were not even advised that the documents had been placed in the City Library until they received the letter of October 15, 1979 from Marilyn J. Krein, Clerk-Treasurer of the City of Westport. See Appendix L, App. 111. That letter advised the LaMon's for the first time that Mr. Regan's material had been placed in the library, and that the clerk had copied that material for that purpose.

The Police Chief delivered the material from his police files and his personal file to the City Clerk, copies of which were made, and this material was placed in the library. This was done prior to the material being placed in the library on September 25, 1979. This material was not part of the federal judicial record, contained private police information regarding petitioners, and other materials of a defamatory and private nature. For instance, it

contained letters between the Police Chief and his attorney, the Police Chief's comments regarding answers by petitioners to discovery, a record of all contact the petitioners had with the police department, and a news article which has been adjudged to be defamatory. A representative example of the material in the library is set forth in Appendix M, App. 112-123 inclusive. This material indicated that the LaMon's made unwarranted attacks against law enforcement officers, and were communists. The material also included a news release which falsely indicated that Lorraine LaMon, one of the petitioners, had been convicted of Assault. There was also reference to a complaint made against the LaMon's business establishment concerning food poisoning, when the facts were that the lady had actually suffered an attack of gallbladder. The entire file was 505 pages of specially selected and fabricated derogatory falsehoods.

The petitioners then brought an action against the City of Westport and its officials for defamation and invasion of privacy. Appendix N, App. 124 inclusive.

The appellees (defendants) then moved for summary judgment alleging that there was no evidence as a matter of law regarding publication. Affidavits and depositions were filed showing publication. This motion for summary judgment was denied. Appendix E, App. 88; thereafter the defendants moved for summary judgment on the basis that as a matter of law, the designated file materials would not support an action for defamation and/or invasion of privacy. Appendix O, App. 128. The trial court on November 21, 1983 orally denied the defendant's second Motion for Summary Judgment. Subsequently petitioners received a letter from the trial Judge dated December 20,

1983, in which the defendants' second Motion for Summary Judgment was granted. Appendix P, App. 130. No reasons were given by the court for granting the second Motion for Summary Judgment, nor did the court indicate what part of the record it based its decision on.

On January 24, 1984, petitioners filed their Notice of Appeal to the Washington Court of Appeals. On January 27, 1984 the defendants filed a Notice of Claim of Error on Appeal pursuant to RAP 2.5. The defendants never filed a Notice of Cross-Appeal. RAP 2.5 was a rule that defined additional matters that could be raised by appellants for the first time on appeal. This rule did not substitute for an appeal. RAP 2.5(a) provides:

> **(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

Since there was no cross-appeal, most of the material in the trial court regarding the issue of publication was not before the Court of Appeals.

On April 30, 1984, the court certified the matters that the court considered in ruling in favor of defendants on the second Motion for Summary Judgment. This material did not include the material presented on the issue of publication, but was the material that petitioners caused

to be certified regarding the decision on the second motion for summary judgment. Appendix Q, App. 131.

At the oral argument before the Court of Appeals, the attorney for the petitioners pointed out to the court that there had not been a cross-appeal by the defendants in this action, and that he did not feel that publication was an issue before the court. The attorney at that time indicated to the court that if they thought there was an issue on publication before the court that the records should be supplemented regarding this, and asked for an opportunity to address this in a supplemental brief. No response was made by the court. The Court of Appeals in its decision applied the usual rules for summary judgment. It assumed for the purpose of the appeal that the LaMons met their burden regarding a defamatory and false statement, that the publication was unprivileged, but the court ruled against the LaMons on an issue which was not rightfully before the court, to wit, publication.

Despite RAP 9.10 and 9.12, the appellate court in fact ruled against the petitioners on the question of publication, without having a complete record before it regarding this issue, and without having before it a certification by the trial judge as to what the judge had considered in denying the first Motion for Summary Judgment which was based on the alleged lack of publication. Rules on Appeal 9.10 and 9.11, provide:

RULE 9.10
CORRECTING OR SUPPLEMENTING RECORD AFTER TRANSMITTAL TO APPELLATE COURT

If a party has made a good faith effort to provide those portions of the record required by

Rule 9.2(b), the appellate court will not ordinarily dismiss a review proceeding or affirm, reverse, or modify a trial court decision because of the failure of the party to provide the appellate court with a complete record of the proceedings below. If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party (1) direct the transmittal of additional clerk's papers and exhibits, or (2) correct, or direct the supplementation or correction of, the report of proceedings. The appellate court may impose sanctions as provided in Rule 18.9(a) as a condition to correcting or supplementing the record on review.

RULE 9.11
ADDITIONAL EVIDENCE ON REVIEW

(a) Remedy Limited. The appellate court may direct that additional evidence be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(b) Where Taken. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

Despite the fact that the record was not complete, there was still substantial evidence in the record which showed clearly that there was in fact publication of defamatory and private information.

The material was supplied by Police Chief Regan to the city clerk who made two copies of the material. Obviously the city clerk, or her staff had to see the material. These two copies were then placed in the City Library. The Daily World then ran a newspaper article regarding the meeting, and informed the public that the material would be duplicated and made available to the public in the library. Matteson deposition p. 4. (Appendix R, App. 134.) Also the librarian at the time in the Westport Public City Library admitted that people had examined the material after it was placed in the library. (Beverly Westfall deposition, pps. 13 and 14, Appendix S, App. 136).

In addition in the defendants' memorandum in the trial court in support of the defendants' first Motion for Summary Judgment based upon lack of publication, the following admission appeared on page 6 of that memorandum, to wit:

> The council noted that there was a great deal of interest among the citizens of Westport in the litigation, and that citizens were understandably curious as to why municipal funds were being expended in defense of the case. The council members noted at the meeting that the file was presently in the possession of the city clerk, and that it would be inconvenient, awkward and time consuming for the clerk to continually have to make the file available for review by any citizen who stopped by the city clerk's office and desired to review its contents.

Also depositions were taken of Chief Regan and members of the City Council. In the Regan deposition, it was indicated clearly that members of the office of the City Clerk certainly saw the defamatory matter as they made copies of this material for placement in the Westport Public City Library. Regan deposition pps. 4-6 inclusive; (Appendix T, App. 139). Also see pages 7 and 8 of the deposition of the City of Westport City Councilman Frank Schnider. Appendix U, App. 143. To the same effect see deposition of Orville Engle, pp. 3-4, pp. 19-20, Appendix V, App. 146. It is obvious that the record in the Court of Appeals was incomplete on the issue of publication and the Court knew this, and yet ruled on an issue which was not properly before it.

One of the distressing things about the Court of Appeals decision is that Washington law allows convictions for criminal libel on much less evidence that in fact appeared in the appellate record, which was not complete, regarding the issue of publication. Revised Code of Washington (RCW 9.58.030) provides:

> **9.58.030. Publication defined.**
>
> Any method by which matter charged as libelous may be communicated to another shall be deemed a publication thereof.

The petitioners then petitioned the Supreme Court of the State of Washington for review of the decision of the Court of Appeals. That petition was denied.

REASONS FOR GRANTING CERTIORARI

A. Substantive Due Process.

The Fourteenth Amendment of the United States of America was a grant to the United States Supreme Court of the power to protect them against unfair treatment by the states.

The city is a creature of the state. Its action in placing false, defamatory and private matters concerning petitioners was conduct which should shock the conscience of any court. It could serve no legitimate governmental interest and was an act of pure vindictiveness against a helpless citizen who was given no opportunity to be heard.

Such an act clearly meets the substantive due process test of *Rochin vs. California*, 342 U.S. 165, 172 (1952). The placing of the material in question in the Westport City Library was not (1) aimed at achieving a legitimate public purpose, and (2) if it was so aimed the means used was not reasonably necessary and was unduly oppressive. See e.g. *Goldblatt vs. Hempstead*, 369 U.S. 590 (1962); *Lawton vs. Steel*, 152 U.S. 133 (1894); *West Main Assocs. vs. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986).

The need to focus carefully upon exactly what constitutes "liberty" and "property" in the procedural due process area contrasts sharply with the practice in the substantive due process area. In the latter context, it has rarely been an issue in the court's decisions whether "liberty" or "property" was implicated; "liberty" has been assumed to include "just about every interest of significance to an individual". *Griswold vs. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510 (1965);

Eisenstadt vs. Baird, 405 U.S. 438 (1972); *Roe vs. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed.2d 147 (1983); *Gerald Gunther, Constitutional Law*, Eleventh Ed. (1985).

Some commentators have suggested that the courts should recognize as a "substantive aspect of liberty" certain elements of procedural fairness. Professor Van Alstyne, for instance, advocates recognizing "freedom from arbitrary adjudicative procedures" as an element of "liberty". 62 Cornell L. Rev. 487. Nothing is more distressing in a "free society" than arbitrary adjudicative procedures without any recourse to correct the damage done.

B. Procedural Due Process.

Prior to *Board of Regents vs. Roth*, 408 U.S. 564 (1971) the Supreme Court definitions of "liberty" and "property" had amounted in procedural due process to taking the words "life, liberty or property" as a unitary concept embracing all interests valued by sensible men. *Monaghan, Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 409. *Roth* emphasized a need for a careful analysis of the "nature" of the interests at stake. However the court did state in *Roth* on page 573 as follows:

> For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin vs. Constantineau*, 400 U.S. 433, 437. *Wieman vs. Updegraff*, 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee vs. McGrath*, 341 U.S. 123; *United States vs. Lovett*, 328 U.S. 303, 316-317; *Peters vs. Hobby*, 349 U.S. 331, 352 (Douglas, J., concurring).

Subsequently in *Paul vs. Davis,* 424 U.S. 693, reh. denied, 425 U.S. 985 (1976), a divided court held that state defamation of a private individual "standing alone and apart from any other governmental action" did not implicate any "liberty" protected by the due process clause as far as procedural due process was involved.

This narrow definition of "liberty" protected by the due process clause was clearly inconsistent with prior cases. In 1916, in *Butler vs. Perry,* 240 U.S. 328 (1916), Justice McReynolds said that Fourteenth Amendment "liberty was intended to preserve and protect fundamental rights long recognized under the common law system." The court in *Meyer vs. Nebraska,* 262 U.S. 390 (1923) summarized the definition of "liberty" and stated on page 397:

> That "liberty" denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Paul vs. Davis, supra, has been severely criticized in *Monaghan, Of "Liberty" and "Property",* 62 Cornell L. Rev. 405. The following statement was made on pages 423 and 424 of that article:

> In *Paul* the plaintiff complained that a circular sent by local police officials to stores during the Christmas season defamed him by describing him as an "active shoplifter." The plaintiff

asserted that this conduct denied him procedural due process because he had not been given notice and a hearing before the circular was sent. The court of appeals upheld the claim, relying upon the Supreme court's decisions in *Roth* and *Wisconsin vs. Constantineau* to support the proposition that state defamation of a private person implicated a constitutional "liberty." In *Constantineau* the Court had invalidated on due process grounds a state statute that allowed a sheriff to label publicly an individual an alcoholic by posting his name in a public place, without giving him prior notice and a hearing. The Court noted that the challenged procedure denied the individual more than just the opportunity to purchase alcoholic beverages within city limits: the posting was an act of defamation. In language subsequently quoted with approval in *Roth*, the Court said that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

But in *Paul*, the Court characterized this same language as ambiguous and supportive of the respondent's claim only if "read that way." The majority then proceeded to distinguish a long line of decisions which had recognized the standing of a plaintiff to complain about governmental defamation. The Court concluded that in all those cases the defamation standing alone was insufficient to implicate a liberty interest; instead, all involved an interference with some specific constitutional guarantee or with some other "more tangible" interest created by state law. The Court cavalierly distinguished *Constantineau* by noting that the state defamation there involved – posting by the sheriff – had the legal effect of cutting off the plaintiff's prior state-created right to buy liquor, a

> factor which, the Court failed to add, played an obviously trivial role in the decision of that case. The Court's re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents. In many ways I find this *Paul's* most disturbing aspect. Fair treatment by the Court of its own precedents is an indispensable condition of judicial legitimacy.

The writer in the Cornell Law Review believes *Paul vs. Davis* should be overruled. Id. p. 432. For additional criticism see the Supreme Court, 1975 term, 90 Harv. L. Rev. 58, 93 n. 44 (1976).

Paul vs. Davis, supra, seems to be at complete odds with previous decisions which include *Wisconsin vs. Constantineau*, 400 U.S. 433 (1971), and *Wolfe vs. McDonnell*, 418 U.S. 539 wherein the court stated:

> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection by the individual against arbitrary action of government.

It is submitted that the case of *Paul vs. Davis* should be understood and limited in its application as a case about federalism based limits on the remedial powers of a federal court acting under § 1983 rather than as a repudiation of deep substantive principles under the Fourteenth Amendment. Laurence H. Tribe (1988), *American Constitutional Law*, Second Ed.

C. Seventh and Fourteenth Amendment Limitations on Summary Judgments.

The summary judgment order affirmed by the appellate court was based upon an issue which was not before

it and for which there was an incomplete record. There are constitutional due process limitations upon the power of a court, even in the aid of their own valid processes, to dismiss an action without affording a party an opportunity for hearing on the merits of his cause. *Societe Internationale vs. Rogers*, 357 U.S. 197, 209, 2 L. Ed.2d 1255, 1265, 78 S. Ct. 1087 (1965).

The Seventh and Fourteenth Amendments limit a court's authority to dismiss a properly filed and well pleaded case. *Fidelity and Deposit Co. vs. United States*, 187 U.S. 315, 320, 47 L. Ed. 194, 198, 23 S. Ct. 120 (1902); *Hovey vs. Elliot*, 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841 (1897).

In *Williams vs. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986), the court held that it was error to enter summary judgment for a defendant on an issue not raised by defendant in its motion and not directly addressed by plaintiffs. That court further held that at a minimum the district court should have provided plaintiffs with notice regarding the consideration of this issue and a meaningful opportunity to address the issue.

It does not seem that a decision based upon an incomplete record is consistent with a desire for fairness or for justice. The appellate court should not have considered the issue of publication for the purpose of its decision.

A party in answering a motion for summary judgment has the right to rely on those specific issues raised in the motion. Anything else would be unfair and certainly would not allow the court to rule intelligently on the issues.

In *Fairfield Scientific Corp. vs. U.S.*, 611 F.2d 854 (1978), the court held that notice of a parties' position in a motion for summary judgment must be given so that the opposing party has an adequate opportunity to respond. See *Russell vs. Atlas Van Lines, Inc.*, 411 F.Supp. 1111 (1976).

This is consistent with the requirements of fairness and due process. Due process expresses a requirement of fundamental fairness. *Lassiter vs. Department of Social Services of Durham County*, N.C. (1981) 101 S. Ct. 2153, 452 U.S. 18, 68 L. Ed.2d 640, rehearing den. 102 S. Ct. 889, 453 U.S. 927, 69 L. Ed.2d 1023.

Although no case could be found that the Seventh Amendment right of jury trial in civil cases has been incorporated in the Fourteenth Amendment due process right, it is believed that the right to a jury trial is one of the fundamental rights retained by the people under U.S. Const. Amendment 9 which states:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The trial court did not set forth the basis for its decision granting summary judgment. See App. 85, 86. Dismissal without stating grounds therefore deprived petitioners of an opportunity to make a sufficient record for review, and deprived the reviewing court of a fair record for review. See *Wilson vs. Volkswagon of America, Inc.*, 561 F.2d 494, 505 (4th Cir. 1977), cert. den., 434 U.S. 1020 (1978) (due process requires a trial court to fully set forth the basis for awarding sanctions against a party); *Societe Internationale*, supra.

D. Constitutional Right of Privacy.

Justice Louis Brandeis defined the constitutional right of privacy as "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead vs. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

The United States Constitution does not explicitly mention any right to privacy. The Supreme Court of the United States, however, has recognized that the right to privacy is implicit in various amendments to the Constitution, including the First,[1] Fourth,[2] Fifth,[3] Ninth,[4] and Fourteenth Amendments,[5] and the penumbra of the Bill of Rights.[6]

Only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" have been included in the guarantee of personal privacy. *Roe vs. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed.2d 147 (1972); *Palko vs. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

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[1] *Roe vs. Wade*, 410 U.S. at 113, 93 S. Ct. 705, 35 L. Ed.2d 147 (1972).

[2] *Katz vs. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967).

[3] *Bellis vs. United States*, 417 U.S. 85, 94 S. Ct. 2179, 40 L. Ed.2d 678 (1974).

[4] *Griswold vs. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510 (1965).

[5] *Carey vs. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed.2d 675 (1976).

[6] *Griswold vs. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510 (1965).

Although the cases which have recognized the right of privacy have been limited largely to matters regarding marriage, procreation, and family relationships, in *Whalen vs. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed.2d 64 (1977), the Supreme Court declared that the right to privacy encompasses two different kinds of interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Id. at 599-600, 97 S. Ct. at 876.

The individual's right to protection of his or her good name "reflects no more than our basic concept of essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this court as a basic of our constitutional system." *Rosenblatt vs. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring), quoted in *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

Nothing less could account for the fact that reputation when protected by state law, "is sufficient to overcome the specific protections of the First Amendment." *Paul vs. Davis*, 424 U.S. 693, 723 n. 11 (1976) (Brennan, J., dissenting). The Supreme Court has unmistakably held in a long series of cases, that even an individual with no other basis to demand the protections of procedural due process could do so if government was acting in such a

way as to threaten the individual's "good name, reputation, honor or integrity." See e.g. *Board of Regents vs. Roth*, 408 U.S. 564, 573 (1972).

Justice Brennan in a concurring opinion in *Whalen vs. Roe*, 429 U.S. 589, 606-607, 97 S. Ct. 869, 880, 51 L. Ed.2d 64 (1977) stated his belief that governmental data collection practices that were not carefully limited as to the use of information concerning private persons would deprive those persons of a constitutionally protected privacy interest. The majority opinion by Justice Stevens held that the New York law that required Physicians and Pharmacists to forward to state authorities copies of prescriptions for medicines containing certain narcotics was valid even if the right to privacy places some restriction in the ability of government to collect data concerning individual citizens.

It is believed that the Supreme Court's decision in *Thornburgh vs. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed.2d 779 (1986) supports Justice Brennan's theory in *Whalen* that the due process right to privacy places restrictions on government collection and use of data on individual citizens.

Recently in a Tenth Circuit case,[7] where plaintiff claimed that police officers violated his right to privacy by exhibiting improperly obtained "highly sensitive, personal, and private" photographs to a number of his acquaintances, the court distinguished *Paul vs. Davis* and ruled that plaintiff had stated a claim. There was more

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[7] *Slayton vs. Willingham*, 726 F.2d 631 (10th Cir. 1984).

involved here than mere damage to reputation; the constitutional right to privacy included, in the words of *Whalen vs. Roe*, the "interest in avoiding disclosure of personal matters."

As stated by Laurence H. Tribe (1988) in his text *American Constitutional Law*, Second Ed. on page 1398, to wit:

> If the court's denial that *Paul v. Davis*, involved any substantively protected interests had been truly authoritative, the Court's careful canvassing of the procedural safeguards provided by New York to the patients whose drug prescriptions were retained for five years in computer banks would have been quite unnecessary in *Whalen vs. Roe*, and there would have been no need, in a decision handed down on the same day as *Whalen*, for the court to stress the fact that a non-tenured public employee, who sought damages for his former employer's dissemination of the derogatory information leading to his dismissal, had failed to challenge the truth of the information in question. Assuming, therefore, that *Paul v. Davis* must be understood as a case about federalism-based limits on the remedial powers of a federal court acting under § 1983 rather than as repudiation of deep substantive principles under the fourteenth amendment, constitutional review of information-gathering and information-dissemination practices remains very much a possibility in subsequent cases.

CONCLUSION

It is submitted that the petitioners have a liberty and privacy right entitled to both substantive and procedural

due process. These due process rights have been violated by the trial and appellate courts of Washington State. In the face of the arbitrary adjudicative procedures in the State Courts, petitioners have nowhere to seek justice, except before this court.

This court is respectfully requested to issue a Writ of Certiorari to the Washington Supreme Court, and to the Washington Appellate Court, and reverse the decisions therein.

Respectfully submitted,

/s/ Jack L. Burtch
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APPENDIX A

[No. 7541-5-II. Division Two. July 31, 1986.]

EDWARD LAMON, ET AL, *Appellants*, v. THE CITY OF WESTPORT, ET AL, *Respondents*.

[1] **Libel and Slander – Summary Judgment – Nonmedia Defendant – Standard of Proof.** The plaintiff in a defamation action need not establish a prima facie case by evidence of convincing clarity in order to defeat a summary judgment motion by a nonmedia defendant.

[2] **Libel and Slander – Privilege – Republication – Effect.** The placing of court records and related correspondence in a nonjudicial public location for public inspection is a republication of the statements contained therein and no judicial proceeding privilege attaches to the republication.

[3] **Libel and Slander – Publication – Communication – Inference – in General.** Any inference of communication arising from circumstances surrounding a defamatory statement is rebutted by evidence that communication was unlikely.

[4] **Privacy – False Light – Elements.** Publication of a falsehood is an element of the tort of a false light invasion of privacy.

[5] **Privacy – Intrusion – Public Records.** Matters of public record cannot form the basis of a claim for intrusion into one's private affairs.

[6] **Judges – Disqualification – Number of Affidavits – Single Cause of Action.** Spouses who have separate causes of action but join together in asserting a single claim as husband and wife constitute one party for the purposes of RCW 4.12.050, and can file only one affidavit of prejudice against a trial judge.

Nature of Action: A husband and wife sought damages for defamation and invasion of privacy. The defendants had placed in a public library materials relating to a

lawsuit brought by the plaintiffs against some of the defendants.

Superior Court: The Superior Court for Grays Harbor County, No. 73736, John H. Kirkwood, J., on January 9, 1984, entered a summary judgment in favor of the defendants.

Court of Appeals: Holding that the plaintiffs failed to prove the elements of defamation or invasion of privacy and that the trial judge properly disregarded a second affidavit of prejudice, the court *affirms* the judgment.

Jack L. Burtch, for appellants.

Steven Soha, *William A. Olson*, and *Aiken, St. Louis & Siljeg*, for respondents.

[As amended by order of the Court of Appeals August 28, 1986.]

REED, J. – Edward and Lorraine LaMon appeal the summary judgment dismissing their defamation and invasion of privacy claims.

On July 3, 1980, the LaMons brought this action for defamation and invasion of privacy against the City of Westport, the members of the Westport city council, and the Westport police chief, John Regan (collectively referred to herein as "the City"), based upon the action of the defendants in placing in the public library materials relating to a lawsuit by the LaMons against the police chief.

In that lawsuit, brought in federal court, the LaMons claimed that the police chief denied them equal police

protection and that he had falsely arrested and maliciously prosecuted them. The LaMons' suit against Regan was brought during a lapse in the city's insurance policy and, subsequently, the City decided to finance Regan's legal fees. Following a 1978 judgment against Regan on the equal protection claim, totaling $27,500, the Westport city council determined to finance Regan's attorney's fees on appeal and to post an appeal bond. Additionally, the city council decided to place in the public library a large file of materials from the LaMon litigation so that interested citizens could see for themselves the justification for this expenditure of municipal funds. The council contacted the LaMons so that they could include documents of their choice in the file. The LaMons, however, declined.

The file that was placed in the public library totaled 505 pages and included appellate briefs, trial memoranda and briefs, orders, findings and conclusions of the Federal District Court; correspondence (1) between Regan and his attorney, (2) between Regan and the city council, (3) between Regan's counsel and the city council, (4) between the LaMons and the city council, (5) between the LaMons and the city attorney; trial transcripts, interrogatories and answers to interrogatories, comments on answers to interrogatories, and police investigation reports. In their response to interrogatories in this action, the LaMons identified those portions of the file they considered to be defamatory. At least 15 of the documents in the file contain allegedly defamatory matter. Because of the nature of our decision here, however, we find it unnecessary to set forth the allegedly defamatory statements.

While at the public library, the file was kept on a shelf under the checkout desk and was accessible to the public only through the librarian or her staff. In her deposition, the librarian testified that during the time the file was at the library one man asked for the file and, in front of the librarian, flipped through the pages of the file for perhaps a minute. Another man asked for the file but, upon seeing its size, said he was too busy and did not actually look through the file. The librarian stated that, other than the LaMons, she did not know of anyone else who looked at or asked to see the file. A Ms. Matteson, however, deposed that she was given the file but that she did not read any of the material in the file because she was only copying down case numbers she thought might be of interest to her daughter in her first year of law school.

In July 1980, and shortly after the filing of the complaint, Mr. LaMon filed an affidavit of prejudice against Judge Schumacher. On October 10, 1983, Mrs. LaMon filed an affidavit of prejudice against Judge Kirkwood, the only other Grays Harbor County Superior Court Judge. Judge Kirkwood promptly denied Mrs. LaMon's motion for disqualification because of Mr. LaMon's affidavit of prejudice against Judge Schumacher. On December 20, 1983, Judge Kirkwood granted the defendants' motion for summary judgment.

[1] The usual rules of summary judgment apply where a nonmedia defendant seeks summary judgment in a defamation suit for a statement about private affairs. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). Under these rules, summary judgment is properly granted if no genuine issue of material fact exists when

the evidence and all reasonable inferences from the evidence are considered in the light most favorable to the nonmoving party. CR 56(c); *Dunlap v. Wayne, supra.* We apply the usual rules of summary judgment here.[1]

A defamation plaintiff must show four essential elements: a defamation and false statement, an unprivileged publication, fault, and damages. *Bender v. Seattle,* 99 Wn.2d 582, 599, 664 P.2d 492 (1983). Assuming arguendo that the LaMons have met their burden on the first element but with grave doubts that they have done so,[2] we

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[1] The United States Supreme Court recently decided that the summary judgment determination must be guided by the substantive evidentiary standards that apply to the particular case. *Anderson v. Liberty Lobby, Inc.,* ___ U.S. ___, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Thus, were we to hold that the LaMons are public figures, an issue we do not reach, and must show "actual malice" by *evidence of convincing clarity,* the appropriate summary judgment standard would be "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.,* 106 S. Ct. at 2514. As interpreted by the *Anderson Court,* then, there are no "usual rules" of summary judgment.

[2] The function of the court is to determine whether the statement is capable of defamatory meaning, and the function of the jury is to determine whether the statement was in fact defamatory. *Amsbury v. Cowles Pub'g Co.,* 76 Wn.2d 733, 738, 458 P.2d 882 (1969); Restatement (Second) of Torts § 614 (1977). Some of the alleged defamatory statements in the file are clearly incapable of defamatory meaning. For instance, the statement in the federal district court order that "[t]he [LaMons'] claims are frivolous . . . " is in no way defamatory.

(Continued on following page)

address the question of whether there is a genuine issue as to whether a publication of the alleged defamatory statements occurred.

[2] First, we reject the City's contention that, if a publication occurred, that publication was absolutely privileged as being made in the course of judicial proceedings. That absolute privilege applies to allegedly defamatory statements spoken or written by a party or counsel in the course of judicial proceedings that are pertinent or material to the relief sought. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); Restatement (Second) of Torts §§ 586, 587 (1977). However, in this case, the placing of the file in the public library would constitute, assuming communication of its contents to a third party, a republication of statements made originally in the course of a judicial proceeding. The republication of a defamatory statement, being a separate publication, may make the second publisher liable although the original publisher is protected by a privilege. Restatement § 578, comment *b*. Any republication of the materials in the file would not be made in the course of a judicial proceeding and therefore would not be privilege. Nor do we find applicable any other privilege asserted by the City.

Any act by which the defamatory matter is intentionally or negligently communicated to a third party is a

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(Continued from previous page)

Other statements, for example those reporting community sentiment that the LaMons may be communists, could be considered capable of defamatory meaning, though such is less likely when the statements are taken in context.

publication. Restatement § 577, comment *a*. The City contends that the Lamons have failed to identify any third party who read the file. The LaMons do not address this issue in their brief, but they argued before the trial court that, under the circumstances, publication could be inferred. The LaMons argued below, quoting *First State Bank v. Ake*, 606 S.W.2d 696, 701 (Tex. Civ. App. 1980), that "[i]f the circumstances indicated that communication to a third party is likely, however, a publication may properly be held to have occurred."

[3] The circumstances here do not support the inference that a publication occurred. Were the file placed on a library rack where the public could read it without having to request it and receive it from the library staff, the inference of publication would be strong. Here, however, a person wishing to read the file, not on public display, had to request it from the library staff. The City introduced evidence to show it was unlikely that anyone read the file. The one person who flipped quickly through the 505-page file cannot be deemed to have read it and to have become aware of its allegedly defamatory content. This evidence serves to rebut any inference of publication and makes it incumbent upon the LaMons to assert something more than that inference. The LaMons have not done so. Consequently, we find no issue of fact and conclude, as a matter of law, that no publication occurred.

[4] This conclusion that no publication occurred, dispositive of the LaMons' defamation claim, is also dispositive of their invasion of privacy claim based upon publicity that places them in a false light. By definition, false light publicity requires *publicity* of the falsehood, that is, to a substantial number of people. Restatement

(Second) of Torts § 652E (1977); Restatement (Second) of Torts § 652D, comment *a*, at 384 (1977). *Cf. Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 471, 722 P.2d 1295 (1986) (applying 2-year statute of limitations to false light invasion of privacy claim). Absent any publication, there can be no publicity.

[5] The LaMons' invasion of privacy claim based upon an unreasonable intrusion upon their private affairs is similarly without merit. The LaMons have not explained what private affairs were intruded upon. Moreover, much of the material in the file is a matter of public record, upon which an action for intrusion into private affairs cannot lie. *See Singer v. Bell*, 613 F. Supp. 198, 204 (S.D.N.Y. 1985); Restatement (Second) of Torts § 652B, comment *c* (1977). Also, no "intrusion" occurred in the sense required by this cause of action. *See* Restatement § 652B.

We will not consider the LaMons' allegation of the tort of outrage because they did not assign error to the denial of their motion to amend their complaint to add that tort. *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 28, 593 P.2d 156 (1979). In any event, the evidence does not support a cause of action for outrage or intentional infliction of emotional distress.

[6] The final issue before us is whether, under the facts of this case, the trial judge properly denied Mrs. LaMon's affidavit of prejudice because of Mr. LaMon's earlier affidavit of prejudice against another judge. In *LaMon v. Butler*, 44 Wn. App. 654, 722 P.2d 1373 (1986), decided this same day, we adopted the rule that spouses joined in an action may each file affidavits of prejudice,

pursuant to RCW 4.12.050,[3] if each spouse has and asserts a separate cause of action. Here, unlike in *LaMon v. Butler, supra*, the alleged defamatory statements referred to both Mr. and Mrs. LaMon and therefore each has a cause of action for defamation. Nevertheless, the LaMons do not assert separate causes of action. Their complaint is framed in terms of one cause of action brought by them as husband and wife. The prayer for relief does not seek separate or differing amounts of damages for each. *See Romero v. Felter*, 83 N.M. 736, 741, 497 P.2d 738 (1972). By joining together in one cause of action for one sum of damages, the LaMons acted as one "party." Under RCW 4.12.050, they are entitled to file only one affidavit of prejudice, and the trial judge acted properly in denying their second such affidavit.

The judgment of the trial court is affirmed.

WORSWICK, C.J., and ALEXANDER, J., concur.

Reconsideration denied September 4, 1986.

Review by Supreme Court pending January 30, 1987.

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[3] RCW 4.12.050, in pertinent part, states:

"Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge . . . no party or attorney shall be permitted to make more than one such application in any action or proceeding . . . "

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EDWARD LaMON and LORRAINE LaMon husband and wife, Appellants, v. CITY OF WESTPORT, a Municipal Corporation, BILL WADE, JR. and JANE DOE WADE, his wife, ORVILLE ENGLE and JANE DOE ENGLE, his wife, FRANK SCHNIDER and JANE DOE SCHNIDER, his wife, GARY PEDERSEN and JANE DOE PEDERSEN, his wife, CHERYL AHERN and JOHN DOE AHERN, her husband, GLEYN BLEDSOE and JANE DOE BLEDSOE, his wife, and JOHN J. REGAN and MABEL REGAN, his wife, Respondents.	NO. 7541-5-II DIVISION TWO ORDER CHANGING OPINION (Filed August 28, 1986)

The Court of Appeals, Division II hereby orders the following substitution to the Court's opinion in *Edward LaMon and Lorraine LaMon, husband and wife v. City of Westport, a Municipal Corporation, et al.*, No. 7541-5-II.

The citation contained in the first paragraph appearing on page 7, which reads *Fellows v. National Enquirer, Inc.*, 165 Cal. App. 3d 512, 211 Cal. Rptr. 809, 821 (1985), is hereby deleted and, in its place and stead the following citations shall be substituted: Restatement (Second) of Torts § 652E (1977); Restatement (Second) of Torts § 652D

Comment *a*, at 384 (1977). *Cf. Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 471, ___ P.2d ___ (1986) (applying two-year statute of limitations to false light invasion of privacy claim).

IT IS SO ORDERED this *28th* day of August 1986.

/s/ Edward P. Reed
ACTING CHIEF JUDGE

/s/ Alexander, J.

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cc: Reporter of Decisions
Jack L. Burtch
Steven Soha/William Olson
Judge John H. Kirkwood

APPENDIX C

THE SUPREME COURT

State of Washington

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Re: Supreme Court No. 53195-I – Edward Lamon, et ux. v. City of Westport, et al.

Court of Appeals No. 7541-5-II

Counsel:

The above entitled petition for review was considered by the Court on its June 6, 1989, petition for review calendar.

The petition was denied by order number 191/121 filed on June 6, 1989.

Sincerely,
/s/ C. J. Merritt
C. J. MERRITT
Supreme Court Clerk

AJE:mja

[No. 7520-2-II. Division Two. July 31, 1986.]

EDWARD LAMON, ET AL, *Appellants, v.* BETTY BUTLER, ET AL, *Respondents.*

[1] **Libel and Slander – Summary Judgment – Media Defendant – Standard of Proof.** The plaintiff in a defamation action must establish a prima facie case by evidence of convincing clarity in order to defeat a summary judgment motion by a media defendant.

[2] **Libel and Slander – Defamatory Meaning – Determination.** Whether a communication is capable of a defamatory meaning is a legal question; whether a communication capable of a defamatory meaning was in fact defamatory is a question of fact. An assertion that a statement was innocuous under the circumstances goes to the factual question.

[3] **Libel and Slander – Defamatory Meaning – In General.** A communication is defamatory if it tends to harm the reputation of another and lower him in the estimation of the community or deters third persons from association or dealing with him.

[4] **Libel and Slander – Criminal Law – Conviction – Reversal – Effect.** For purposes of a defamation claim, it is false to state that a person has been convicted without including information as to a subsequent reversal and voiding of the conviction.

[5] **Libel and Slander – Fault – Private Individual – In General.** The fault necessary to render a defamation defendant liable to a private individual for publishing a false statement is the absence of reasonable care.

[6] **Judges – Disqualification – Number of Affidavits – Spouses.** A spouse who does not have a separate cause of action and who has joined in the other spouse's law suit only by virtue of being a part of the marital community does not have a separate right to file an affidavit of prejudice against a judge under RCW 4.12.050.

Nature of Action: A husband and wife sought damages from a newspaper and its employee for stating in an article that the wife had been convicted of a crime. The conviction had been reversed and the prosecution dismissed on appeal.

Superior Court: The Superior Court for Grays Harbor County, No. 81-2-00748-8, John H. Kirkwood, J., entered a summary judgment on December 22, 1983, in favor of the defendants.

Court of Appeals: Holding that the statement was false but that the plaintiffs failed to prove fault by evidence of convincing clarity, and that the trial judge properly disregarded a second affidavit of prejudice, the court *affirms* the judgment.

Jack L. Burtch, for appellants.

Curtis M. Janhunen and *Charette, Brown, Edwards, Lewis & Janhunen,* for respondents.

REED, J. – Edward and Lorraine LaMon appeal the summary judgment dismissing their defamation action against The Daily World and its employee, Betty Butler. We affirm.

The LaMons filed an action for defamation on September 24, 1981, based upon the publication of an article

on September 25, 1979, by The Daily World, a newspaper of general circulation in Grays Harbor County. The article discussed a Westport city council meeting during which a number of Westport citizens explored the possibility of community fund-raising to provide a bond to cover a judgment obtained by the LaMons against Westport police chief John Regan. As background information, the article stated that "[t]he original lawsuit filed by the LaMons stemmed from a 1972 incident that resulted in a municipal court assault conviction of Mrs. LaMon." The "original lawsuit" referred to in this article was a federal court action against the police chief and against John Peterson, the complaining witness in an assault prosecution against the LaMons. The federal suit alleged false arrest, malicious prosecution, and a denial of equal protection arising from the chief's failure to provide adequate police protection for the LaMons' business.[1] An earlier suit in superior court for false arrest and malicious prosecution against the same defendants was dismissed, and the dismissal was affirmed on appeal. The claims of false arrest and malicious prosecution derived from an

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[1] After a dismissal of the LaMons' suit by the Federal District Court and a reversal and remand by the Ninth Circuit, the Federal District Court found that the police chief had denied the LaMons equal police protection and awarded them $25,000 in damages and $2,500 in attorney's fees. According to the September 25 article, the "original lawsuit" had been filed "on a single day when the city's liability insurance coverage for Regan had lapsed on one policy and had not been picked up on another. Thus, the city has paid Regan's attorney costs in the numerous appeals of the case since 1974." At the time the article was published, Regan was appealing the judgment to the Ninth Circuit.

incident at a restaurant then owned by the LaMons which resulted in the assault charges being filed against the LaMons. The Municipal Court dismissed the case against Mr. LaMon and found Mrs. LaMon guilty of misdemeanor assault. Mrs. LaMon appealed that judgment and, on appeal, the Superior Court dismissed the case with prejudice. The record before this court does not reveal the basis for the dismissal, except that it was by stipulation of the parties.

In their complaint for defamation, the LaMons alleged that The Daily World and Betty Butler, the author of the article, had defamed Mrs. LaMon by stating falsely that she had been convicted of assault in municipal court in 1972. The article made no reference to the fact that her assault conviction had been dismissed on appeal. In her affidavit, Mrs. LaMon states that Butler had the superior court order read to her over the telephone and that therefore she knew that the assault action had been dismissed with prejudice. Butler, however, states in her deposition that, although she knew the contents of the order of dismissal, she did not understand that the effect of the order was to void the conviction.

On December 1, 1983, Mr. LaMon filed an affidavit of prejudice against Judge Schumacher and Mrs. LaMon filed an affidavit of prejudice against Judge Kirkwood. Judge Schumacher and Judge Kirkwood were then the only superior court judges in Grays Harbor County. Judge Kirkwood did not disqualify himself. On that same day he issued his memorandum decision granting the defendants' motion for summary judgment.

[1] A defamation plaintiff must show four essential elements: a defamatory and false statement, an unprivileged communication, fault, and damages. *Bender v. Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983); *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 233, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945, 60 L. Ed. 2d 1047, 99 S. Ct. 2164 (1979); Restatement (Second) of Torts § 558 (1977). A defamation plaintiff resisting a *media* defendant's motion for summary judgment must establish a prima facie case by evidence of convincing clarity.[2] *See Dunlap v. Wayne*, 105 Wn.2d 529, 533-35, 716

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[2] In *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986), the court noted Justice Rehnquist's suggestion in *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 813, 104 S. Ct. 1482 (1984) that the Court recognizes no special rules protecting defamation defendants in summary judgment actions. The court also noted that the Supreme Court was currently considering this very issue in *Anderson v. Liberty Lobby, Inc.*, ___U.S.___, 91 L. Ed. 2d 202, 106 S.Ct. 2505 (1986), but stated that "[i]n any event, the Washington Constitution may provide heightened protection to media defendants. Const. art. 1, § 5; *see State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984)." *Dunlap v. Wayne*, 105 Wn.2d at 534 n.1.

The United States Supreme Court recently handed down its decision in *Anderson v. Liberty Lobby, Inc., supra*, in which it held that the evidentiary standard on summary judgment is governed by the substantive evidentiary standard that applies at trial in a particular case. In defamation actions, the substantive evidentiary standard is controlled by the classification of the plaintiff as either a private individual or as a public figure or official. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964). Thus, because a public figure or official must, at trial,

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P.2d 842 (1986); *Mark v. Seattle Times*, 96 Wn.2d 473, 486-87, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 73 L. Ed. 2d 1339, 102 S. Ct. 2942 (1982).

[2, 3] The initial question on summary judgment is whether the statement at issue is capable of a defamatory meaning. If the answer is in the affirmative, it is then the jury's function to determine whether the statement is in fact defamatory. *Miller v. Argus Pub'g Co.*, 79 Wn. 2d 816,

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show actual malice be evidence of convincing clarity, the appropriate summary judgment standard is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2514.

The Washington Supreme Court, by apparently holding the summary judgment standard dependent upon the defendant's status as media or nonmedia – at least when the nonmedia defendant's alleged defamatory statement is about "private affairs" – differs from the United States Supreme Court's approach, which, in defamation actions, turns on the status of the plaintiff. *See Dunlap v. Wayne, supra; Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 73 L. Ed. 2d 1339, 102 S. Ct. 2942 (1982). Because of this difference in approach, this case presents a situation where we, guided by *Dunlap v. Wayne* and *Mark v. Seattle Times*, apply a stricter evidentiary burden on summary judgment than would the United States Supreme Court. We apply the convincing clarity standard because of The Daily World's status as a media defendant. The United States Supreme Court would not require evidence of convincing clarity because the LaMons, as we determine *infra*, are private individuals. *Anderson v. Liberty Lobby, Inc., supra*. The necessary conclusion in this situation is then that the Washington Constitution does provide heightened protection to media defendants. *Dunlap v. Wayne, supra*.

820 n.3, 490 P.2d 101 (1971); *Amsbury v. Cowles Pub'g Co.*, 76 Wn.2d 733, 738, 458 P.2d 882 (1969). A statement is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). The imputation of a criminal offense traditionally has been categorized as defamatory per se. *See, e.g., Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983); *Amsbury v. Cowles Pub'g Co.*, 76 Wn.2d at 737. Even if, as Butler and The Daily World assert, the reference to Mrs. LaMon's conviction could be considered, under the circumstances, innocuous, the reference is certainly capable of defamatory meaning. That is all this court need decide on this issue.

[4] Butler and The Daily World contend, however, that, even if defamatory, the statement that Mrs. LaMon was convicted of assault is true. Truth, of course, is a complete defense of a claim of defamation. *Jolly v. Fossum*, 59 Wn.2d 20, 24, 365 P.2d 780 (1961); *O'Brien v. Franich*, 19 Wn. App. 189, 194, 575 P.2d 258 (1978). As a general rule, the truth of an alleged defamatory statement must be measured "as of the time of the defamatory publication." Restatement (Second) of Torts § 581A, comment *g* (1977). Here the record establishes, first, that Mrs. LaMon was convicted of assault in municipal court and, second, that the conviction was, in effect, reversed on appeal to the superior court. Thus, although, as a matter of "historical fact", Mrs. LaMon was convicted of assault, as a matter of "legal fact", the conviction, having been reversed, was voided. *See State v. Hill*, 83 Wn.2d 558, 561, 520 P.2d 618

(1974); *State v. Dixon*, 17 Wn. App. 804, 806, 565 P.2d 1207, *review denied*, 89 Wn.2d 1012 (1977).

We find that the LaMons have made a sufficient showing of falsity and that Butler and The Daily World have not rebutted that showing. The falsity in this case lies not in what was said but in what was left unsaid. To find otherwise would yield harsh results for defamation plaintiffs. For example, a person who is arrested erroneously, based on mistaken identity, thereafter should not be subject to media reports citing his arrest while ignoring his subsequent vindication. The test of truth cannot ignore the test of time.

With respect to the next element in the defamation equation, Butler and The Daily World contend that publication of the article containing the alleged defamation was privileged because it was a report of a public proceeding. In *Mark v. Seattle Times, supra*, the court approved the following statement of the rule regarding reports of public proceedings contained in the Restatement (Second) of Torts § 611 (1977):

> [t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Mark v. Seattle Times, 96 Wn.2d at 487.

The problem with the respondents' assertion of this privilege is that the statement regarding Mrs. LaMon's conviction did not derive from what took place at the city

council meeting. As the respondents concede, the statement was merely background information. That statement was, thus, not within the scope of the privilege asserted.

The next issue we reach is that of fault. The degree of fault necessary to make out a prima facie case of defamation depends on whether the plaintiff is (1) a private individual or (2) a public figure or public official. *Bender v. Seattle*, 99 Wn.2d at 599. If the plaintiff is a private individual, a negligence standard applies. *Bender v. Seattle, supra*. If the plaintiff is a public official or public figure, the plaintiff must prove that the defendant acted with "actual malice", that is, with a knowledge of falsity or with a reckless disregard of truth or falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964); *Bender v. Seattle, supra*. Butler and The Daily World argue that the LaMons are public figures and therefore must show actual malice.

The LaMons cannot be classified as public figures. We find it unnecessary, however, to elaborate upon this conclusion because we also conclude that, under the lesser standard of fault that a private plaintiff must show, the LaMons have not met their burden by evidence of convincing clarity. The LaMons base their argument, under either standard of fault, upon their contention that Butler and The Daily World knew the statement to be false because Butler knew the contents of the order dismissing the action against Mrs. LaMon.

[5] Under the negligence standard, a plaintiff may recover for a defamatory falsehood "on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect." (Italics omitted.) *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976).

We reject, first, the contention that Butler knew the statement to be false. Knowledge of the contents of the superior court order is not necessarily equivalent to a knowledge of the legal effect of that order. Butler admits in her deposition that the court clerk read the order to her over the telephone but Butler asserts that she understood the order to mean that it "was not the type of dismissal that negated the judgment [of conviction]." The LaMons have presented no evidence that contradicts Butler's assertion.

We reject, next, any contention that the defendants, in the exercise of reasonable care, should have known the statement about the conviction was false. The superior court order of dismissal is not entirely clear as to its legal effect. That order states that "the above action [City of Westport v. LaMon] be dismissed with prejudice." The order goes on to require *the defendants* to pay all costs. The order says nothing about voiding or negating the judgment, although that is the legal effect of the order. Butler, a lay person, exercised reasonable care by contacting the city attorney, who confirmed her impression that the order did not negate the conviction. The LaMons did not present any evidence that the city attorney told Butler otherwise. The LaMons' evidence would not support a reasonable jury finding that they have shown negligence

by clear and convincing evidence. Under the circumstances, Butler, as a matter of law, must be held to have acted reasonably and conscientiously before publishing. The fact that what she published was false does not mean she acted negligently. The media are not to be held strictly liable for their mistakes.

The last issue concerns the LaMons' contention that the trial judge erred in refusing to disqualify himself based upon Mrs. LaMon's affidavit of prejudice. The LaMons contend that the trial judge did not disqualify himself on the ground that a marital community is entitled to but one affidavit of prejudice.

This issue is one of first impression in this state. The controlling statute, RCW 4.12.050, states in pertinent part:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge . . . no party or attorney shall be permitted to make more than one such application in any action or proceeding . . .

Under the language of the statute, the resolution of this issue turns on whether Mr. and Mrs. LaMon are each, under the facts of this case, entitled to file an affidavit of prejudice because each is a "party."

In the only case we have found that has confronted this issue, *Romero v. Felter*, 83 N.M. 736, 497 P.2d 738 (1972), a husband and wife each claimed damages, in different amounts, from the publication of an alleged

libelous letter that referred to both the husband and wife. The Supreme Court of New Mexico reasoned that, because the plaintiffs each had a separate cause of action that he or she could pursue against the defendant and because the plaintiffs asserted their separate causes of action, each plaintiff, husband and wife, was entitled to disqualify a trial judge under a statute similar in effect to RCW 4.12.050. *Romero v. Felter*, 497 P.2d at 740-41. Underlying the *Romero* decision was the recognition that marital status does not destroy the individual legal identities of the husband and wife. *Romero v. Felter*, 497 P.2d at 739-40.

[6] Washington courts have also recognized that the marital relationship does not destroy the separate legal identities of the spouses. *Christie v. Maxwell*, 40 Wn. App. 40, 43, 696 P.2d 1256, *review denied*, 104 Wn.2d 1002 (1985); *see also Freehe v. Freehe*, 81 Wn.2d 183, 187, 500 P.2d 771 (1972). Following the reasoning in *Romero*, we conclude that recognition of separate identities should be extended to RCW 4.12.050 to allow a husband and wife each to file an affidavit of prejudice when each can be considered a "party" by virtue of a separate cause of action which that "party" has and actually asserts.

In the instant case, however, Mr. and Mrs. LaMon do not assert, nor do they possess, separate causes of action. The alleged defamation referred solely to Mrs. LaMon, and Mr. LaMon has no individual cause of action based upon its publication. It is only by being a part of the marital community that Mr. LaMon has joined in this action.

Consequently, the LaMons are entitled to one affidavit of prejudice under RCW 4.12.050 because they are

but one "party" for purposes of this action. Because they exercised their right under this statute by applying for the disqualification of Judge Schumacher, Judge Kirkwood properly denied their application for his disqualification.

The trial court's order of summary judgment is affirmed.

WORSWICK, C.J., and ALEXANDER, J., concur.

Reconsideration denied September 4, 1986.

Review granted by Supreme Court October 28, 1986.

LaMon vs. Butler

112 Wn.2d 193

[No. 53196-0. En Banc. March 30, 1989.]

EDWARD LAMON, ET AL, Petitioners, v. BETTY BUTLER, ET AL, Respondents.

[1] **Libel and Slander – Summary Judgment – Prima Facie Case – Necessity.** To overcome a motion for summary judgment, a plaintiff in a defamation action has the burden of setting forth specific, material facts, rather than conclusory allegations, sufficient for the trier of fact to find the existence of each element of defamation.

[2] **Judgment – Summary Judgment – Affidavit – Failure To Rebut – Effect.** When a party resisting a summary judgment motion fails to present evidentiary material controverting facts presented by the moving party, a court will accept the truth of the moving party's facts.

[3] **Appeal – Disposition of Cause – Affirmance on Other Grounds – In General.** An appellate court can uphold a correct judgment on any proper theory

established by the pleadings and supported by proof in the record, even though the particular theory it relies on was not considered by the trial court.

[4] **Judges – Disqualification – Affidavit of Prejudice – Number of Affidavits – Colitigants.** All individual plaintiffs together or all individual defendants together constitute a single "party" for purposes of RCW 4.12.050, which limits a party to one affidavit of prejudice.

[5] **Statutes – Construction – Meaningful Interpretation.** A statute will not be interpreted in a manner that results in an absurdity.

UTTER, DORE, and PEARSON, JJ., dissent by separate opinion.

Nature of Action: Defamation action against a newspaper and one of its reporters for publishing articles which stated that one of the plaintiffs had been convicted of assault in municipal court without mentioning that the prosecution was later dismissed in superior court.

Superior Court: The Superior Court for Grays Harbor County, No. 81-2-00748-8, John H. Kirkwood, J., on December 22, 1983, granted a summary judgment in favor of the defendants.

Court of Appeals: The court *affirmed* the judgment at 44 Wn. App. 654, holding that there was sufficient proof of fault and that a second affidavit of prejudice was properly dismissed.

Supreme Court: Upon reconsideration of its prior decision reported at 110 Wn.2d 216, the court *adheres* to its decision *affirming* the decision of the Court of Appeals and the judgment. The court holds that the plaintiffs had

not made a prima facie showing of the defendants' negligence, that the issue of fault was properly before the court, and that the plaintiffs were not entitled to disqualify two trial court judges.

Jack L. Burtch, for petitioners.

Brown, Edwards, Lewis & Janhunen, by *Curtis M. Janhunen*, for respondents.

P. Cameron DeVore, Marshall J. Nelson, and *Stuart R. Dunwoody* on behalf of Allied Daily Newspapers, amici curiae for respondents.

DURHAM, J. – The plaintiffs in this case brought a defamation action against a newspaper and one of its reporters. The trial court dismissed the plaintiffs' cause of action by summary judgment. The Court of Appeals affirmed, holding that the plaintiffs had failed to make a prima facie showing of the defendants' fault. We affirm.[1]

On July 2, 1972, an altercation took place between Lorraine LaMon and John Peterson, a summer intern reporter for The Daily World. Both Lorraine LaMon and her husband, Edward, were charged with assault. Edward LaMon's count was dismissed at trial, but Lorraine LaMon was convicted in the Westport Municipal Court.

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[1] This court originally issued an opinion which affirmed the lower court decisions. *LaMon v. Butler*, 110 Wn.2d 216, 751 P.2d 842 (1988). We granted the LaMons' motion for reconsideration and the case was re-argued. Today's opinion supersedes our earlier opinion, although the analysis remains largely unchanged.

Lorraine LaMon appealed to the Grays Harbor County Superior Court. That appeal was dismissed by stipulation of the parties on November 10, 1972. The order of dismissal reads as follows: "It is ordered that the above action be dismissed with prejudice. It is further ordered, adjudged and decreed that the defendants pay all costs in the matter." A copy of this order is included as an appendix.

At that time, Betty Butler was responsible for reporting news in the Westport area for The Daily World, a newspaper of general circulation in Grays Harbor County. Butler learned of the Superior Court's dismissal of Lorraine LaMon's appeal by calling the county clerk's office. A clerk read the order to Butler over the telephone. Butler's understanding of the order was that it "was not the type of dismissal that negated the judgment." Butler also discussed the effect of that order with the Westport City Attorney involved in Lorraine LaMon's appeal. According to Butler's deposition, the city attorney in large part confirmed her interpretation. Butler indicated that the city attorney told her that the dismissal in superior court "had very little to do with the [municipal court] verdict per se".

The assault incident described above provided, in part, the basis of a lawsuit filed in 1974 by the LaMons against Peterson and the Westport Chief of Police, John Regan. The LaMons alleged that Peterson executed a false complaint and that Regan falsely caused them to be arrested. They also alleged that Regan violated their civil rights by failing to provide equal police protection to them over a number of years. The LaMons later dismissed Peterson from the case. They eventually recovered

a $27,500 judgment against Regan on the civil rights claim in 1978. The judgment was affirmed on appeal in 1980.

Regan was not covered by Westport's liability insurance due to a temporary lapse in the policy's coverage. At a meeting of the Westport City Council on September 24, 1979, several citizens proposed that the City help Regan post a bond and pay his legal costs. Butler attended this meeting and wrote an article about it the next day. In that article, she included as background material the fact that Lorraine LaMon had been convicted of assault in municipal court, but she did not mention the superior court dismissal or its effect on the municipal court conviction. Butler made similar statements in other articles that she wrote between 1974 and 1980 concerning this litigation.[2]

The LaMons filed a complaint for defamation against Butler and The Daily World in Grays Harbor County Superior Court on September 24, 1981. The LaMons alleged that Butler's articles were defamatory by implying that Lorraine LaMon remained convicted of assault. They also attempted, unsuccessfully, to disqualify the county's two Superior Court Judges by filing separate affidavits of prejudice. The trial court entered a summary judgment in favor of the defendant on December 22, 1983,

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[2] The parties have focused their attention primarily on the September 1979 article. The other articles written in whole or part by Butler were dated July 10, 1974, August 13, 1974, September 15, 1975, October 20, 1978, September 11, 1979, and April 17, 1980. Because the first five articles were published more than 2 years before the LaMons filed their complaint, the statute of limitations bars any action on them. see RCW 4.16.100(1). The April 1980 article contains the same misstatement that appeared in the September 1979 article.

dismissing the LaMons' cause of action. The Court of Appeals affirmed the dismissal, holding that the LaMons had failed to make a sufficient prima facie showing of the defendants' fault.[3] *LaMon v. Butler*, 44 Wn. App. 654, 722 P.2d 1373 (1986). We granted the LaMons' petition for review.

Summary Judgment

[1] When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements of defamation: falsity, an unprivileged communication, fault, and damages. *See Guntheroth v. Rodaway*, 107 Wn.2d 170, 175, 727 P.2d 982 (1986); *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982). The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); *Guntheroth*, at 175. The nonmoving party is entitled to have the evidence viewed in a light most favorable to him and against the moving party. *Herron*, at 170.

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[3] The Court of Appeals also concluded that the LaMons had succeeded in proving other elements of defamation by clear and convincing evidence, namely, falsity, defamatory meaning, and unprivileged communication. Because we hold that there was no triable issue as to the defendants' fault, we need not address the Court of Appeals' discussion of the other elements.

It is well settled that the standard of fault in defamation cases depends on the nature of the plaintiff. If the plaintiff is a public figure or public official, he must show actual malice. If, on the other hand, the plaintiff is a private figure, he need show only negligence. *Bender v. Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). Not surprisingly, the LaMons characterize themselves as private figures, while The Daily World argues that they are public figures.

A second issue has been raised concerning the appropriate standard of proof by which fault must be shown. Citing *Dunlap v. Wayne*, 105 Wn.2d 529, 533-35, 716 P.2d 842 (1986), the Court of Appeals concluded that the LaMons had to prove their case by clear and convincing evidence because Butler and The Daily World were media defendants. *LaMon*, 44 Wn. App. at 657-58. The LaMons claim that providing greater protection to media defendants in this manner violates the First Amendment. They contend that they should only be required to show fault by a preponderance of the evidence. The Daily World has not expressed any position on this issue. An amicus group, the Allied Daily Newspapers, proposes that instead of focusing on a media/nonmedia distinction, this court should apply the higher standard of proof to issues of public concern and the lower standard to issues of private concern.

Resolution of this case, however, does not require us to address either of these questions. Even if the LaMons were entitled to the more lenient standards of proof and fault, they would still have the burden at summary judgment of showing by a preponderance of the evidence that

Butler and The Daily World acted negligently. This they have failed to do.

The only evidence the LaMons have submitted to show the defendants' negligence is Lorraine LaMon's affidavit, in which she concludes that Butler knew that the statements were false because the order of dismissal was read to her over the telephone. Lorraine LaMon implies that Butler should be charged with knowledge of the order's contents, and we agree. However, the order of dismissal does not on its face give any indication of its effect on the municipal court conviction, and it can be read in two ways. It could be interpreted to mean that the entire prosecution is dismissed, thereby negating the municipal court conviction. Atlernatively, the order can be interpreted to mean that only the appeal in superior court is dismissed, leaving the lower conviction intact. That the defendants were ordered to pay costs only adds to the confusion. The most that can be said is that reading the order would put one on notice to inquire further. And that is precisely what Butler did. She discussed the order with the city attorney involved in the case. According to Butler's deposition, the city attorney told her that the superior court dismissal did not affect Lorraine LaMon's conviction.

[2] These facts do not constitute a prima facie case of negligence, even when we draw all reasonable inferences from the evidence in favor of the LaMons. The LaMons did not present any evidentiary material at summary judgment to controvert Butler's version of her conversation with the city attorney.[4] Thus, those facts are

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[4] In their motion for reconsideration to this court, the LaMons for the first time submitted an affidavit from the city

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accepted as true. *See Washington Osteopathic Med. Ass'n. v. King Cy. Med. Serv. Corp.*, 78 Wn.2d 577, 579, 478 P.2d 228 (1970); *see also Zurita v. Virgin Islands Daily News*, 578 F.Supp. 306, 309 (D.V.I. 1984); *Hideout Records & Distribs. v. El Jay Dee, Inc.*, 601 F.Supp. 1048, 1053 (D. Del. 1984)(and cases cited therein). This principle takes on added weight in the context of defamation cases, where the plaintiff has the burden of making a prima facie case.

A reasonable trier of fact in this case could reach but one conclusion from the evidence: the defendants did not act negligently. Accordingly, the LaMons did not present a prima facie case on the issue of fault, and summary judgment was properly entered against them.[5]

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attorney disputing Butler's account of their conversation. Because this was not presented to nor considered by the trial court on summary judgment, we cannot consider it now on appeal. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 390, 715 P.2d 1133 (1986). Additionally, we deny the LaMons' motion to supplement the record with this evidence pursuant to RAP 9.11, there being no excuse for their failure to present the evidence to the trial court below. See RAP 9.11(a)(3) and the discussion below in the section entitled, "Scope of Issues on Appeal".

[5] The LaMons argue that this conclusion violates their constitutional right to a jury trial. Const. Art. 2 § 21. We are well aware that summary judgment decisions should not involve the resolution of factual issues. Such is the province of the factfinder at trial. Yet, Washington courts have held many times that summary judgment should be granted when reasonable persons, giving all reasonable inferences to the nonmoving party, could only conclude that the moving party is entitled to judgment. In such cases, there is no genuine issue of material fact. *See, e.g., Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). When there is no genuine issue of

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SCOPE OF ISSUES ON APPEAL

The LaMons have argued that it would be unfair for their case on appeal to be decided on the issue of fault. They contend that they did not have notice that the summary judgment hearing would include the issue of fault, because neither the trial judge nor the defendants addressed it below. They conclude that it would be unfair for this court to decide the appeal on the fault issue when it was not argued below.

We find this argument to be without merit. First, the LaMons were furnished with notice that they had to present a prima facie case on the issue of fault in order to survive the defendants' summary judgment motion. The defendants' memorandum in support of summary judgment quoted the following language from *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982):

> Under our cases, a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages. To make out a prima facie case for purposes of avoiding a summary judgment in favor of respondents, Mark would have to allege as to each element facts which would raise a genuine issue of fact for the jury.

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material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial. *See Nave v. Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966), *appeal dismissed*, 385 U.S. 450 (1967); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974).

(Citations omitted.) By reading this memorandum, the LaMons received notice that if they did not present evidence on the issue of fault, they ran the risk of summary judgment being entered against them.

[3] Second, an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). The pleadings establish a defamation cause of action, an essential element of which is the defendants' fault. Therefore, dismissal for a failure to satisfy the burden of proving fault is based on a theory established by the pleadings. Furthermore, this theory is supported by proof in the record, most notably Butler's deposition, which was incontroverted by the LaMons.[6] We conclude that the fault issue is properly before us.

Affidavits of Prejudice

The final issue in this case concerns affidavits of prejudice. Affidavits of prejudice are the means by which litigants in this state can prevent a judge who they perceive to be biased from hearing their case. Affidavits of prejudice are governed by RCW 4.12.040 and 4.12.050, which provide in relevant part:

> No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced

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[6] We note also that the LaMons argued the issue of fault in their briefs, both at summary judgment and in the Court of Appeals.

> against any party or attorney, or the interest of any party or attorney appearing in such cause. . . .

RCW 4.12.040.

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge . . .

RCW 4.12.050.

We have summarized the effect of these statutes as follows:

> Under these statutes and under our decisions a party litigant is entitled, as a matter of right, to a change of judges upon the timely filing of a motion and affidavit of prejudice against a judge about to hear his cause or any substantial portion thereof on the merits. Such a motion and affidavit seasonably filed presents no question of fact or discretion. Prejudice is deemed to be established by the affidavit and the judge to whom it is directed is divested of authority to proceed further into the merits of the action.

State v. Dixon, 74 Wn.2d 700, 702, 446 P.2d 329 (1968).

However, the right to file affidavits of prejudice is not unlimited: "[N]o party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040." RCW 4.12.050.

In this case, Lorraine LaMon filed an affidavit of prejudice against Judge Kirkwood and Edward LaMon filed an affidavit of prejudice against Judge Schumacher.[7] The LaMons argue that because they are each parties, they each have independent rights to file affidavits of prejudice under RCW 4.12.050.

[4, 5] Analysis of this issue revolves around the interpretation of "party" in RCW 4.12.050. Are co-plaintiffs each parties to an action, or instead, do they together constitute one party? This is apparently an issue of first impression in this state. The term "party" is not defined in RCW 4.12.050. However, one of the definitions of "party" in Black's Law Dictionary reads as follows:

> "Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, *the party plaintiff or defendant, whether composed of one or more individuals* and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.

(Italics ours.) Black's Law Dictionary 1010 (5th ed. 1979).[8] Under this definition, the LaMons together would constitute a single party.

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[7] The record does not disclose the disposition of the affidavit filed against Judge Schumacher. Since Judge Kirkwood ultimately ruled on the case, he evidently refused to recuse himself.

[8] Black's Law Dictionary also provides a less restrictive definition of "party", which reads:

(Continued on following page)

This same result has been reached by the Oregon Supreme Court when interpreting a statute similar to ours. The Oregon statute provided that "no party or attorney shall be permitted to make more than two applications in any action or proceeding under this act." *U'Ren v. Bagley*, 118 Or. 77, 85, 245 P. 1074, 46 A.L.R. 1173 (1926) (quoting section 45-3, Oregon Laws). The Oregon Supreme Court interpreted the term "party" in this statute in the following manner:

> "Party" means either plaintiff or defendant, and includes all persons belonging to the particular class: 40 Cyc[lopedia of Law and Procedure] 146 [(1912)]. "Party" is used in a collective sense and if there be a plurality of plaintiffs, they are all only one party litigant.

U'Ren, at 85. *See also* 46 Am. Jur. 2d *Judges* § 212 (1969).

We find this holding to be persuasive. If we were to hold that each plaintiff and each defendant were entitled to file an affidavit of prejudice, then scores of judges could be disqualified in a single case. The Legislature could not have intended that result. Statutes must be

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(Continued from previous page)

> A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A "party" to an action is a person whose name is designated on record as plaintiff or defendant. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment.

(Citation omitted.) Black's Law Dictionary, at 1010. As we explain later in this opinion, we decline to use such an expansive definition of "party" in construing RCW 4.12.050.

interpreted so as to avoid absurd results. *General Tel. Co. of the Northwest, Inc. v. Utilities & Transp. Comm'n*, 104 Wn.2d 460, 471, 706 P.2d 625 (1985). Therefore, we hold that the language of RCW 4.12.050 limits co-plaintiffs or co-defendants to the filing of a single affidavit. The LaMons were only entitled to file a single affidavit of prejudice.[9]

The trial court's decision is affirmed.

CALLOW, C.J., and BRACHTENBACH, DOLLIVER, ANDERSEN, and SMITH, JJ., concur.

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[9] The LaMons argue that even if they were entitled to file only one affidavit of prejudice, then Judge Kirkwood should have disqualified himself upon receiving Lorraine LaMon's affidavit of prejudice. The premise underlying this argument is that Judges Schumacher and Kirkwood should have given priority to Lorraine LaMon's affidavit of prejudice, presumably because the cause of action was more hers than Edward's. However, there was no reason for the judges to do so. Both of the LaMons were named as plaintiffs in the case; therefore, either one had the right to file the single affidavit to which they were jointly entitled. Because they each had this right, the Judges had no way of knowing which affidavit was controlling. There is no evidence in the record to show that the LaMons indicated that one affidavit had priority over the other. Accordingly, we cannot conclude that Judge Kirkwood erred in hearing this case.

APPENDIX

In and For Grays Harbor County

CITY OF WESTPORT, Plaintiff,	)	
vs.	)	No. 2480
EDWARD O. LAMON and LORRAINE LAMON, husband and wife,	)	Order on Motion Filed Nov 10, 1972
Defendants.	)	

This cause coming on for hearing on motion of the defendants by and through their attorney of record, Arthur L. Davies, of Owens, Johnson and Weaver. Attorneys at Law, to dismiss the action and the same being stipulated by counsel, Arthur L. Davies for defendants and William E. Morgan for plaintiff, and the Court being fully advised is the premises, it is ordered that the said motion be and the same is hereby granted. It is ordered that the above action be dismissed with prejudice. It is further ordered, adjudged and decreed that the defendants pay all costs in the matter.

to which ruling the Court _____ excepts and his exception is allowed.

Done in open Court this 10 day of November, 1972.

O.K. _____ /s/ John W. Schumacher, Judge
PRESENTED BY: _____

APPROVED FOR ENTRY BY: /s/ Arthur L. Davies
Attorney for Plaintiff

No objection
William E. Morgan
Attorney

UTTER, J. (dissenting) – I dissent on two grounds. First, this court should unequivocally reject the distinction between media/nonmedia defendants in determining the applicable standard of proof in libel cases. The majority, by citing the opinion of the Court of Appeals, implies that the standard of proof depends upon the status of the defendant: "clear and convincing evidence" against a media defendant and "preponderance of the evidence" against a nonmedia defendant. Majority, at 198. To perpetuate this distinction, even while stating that it would not make any difference in deciding this case, majority at 198, only lends confusion to an area of law that desperately needs grater clarity.

Second, I believe that the LaMons have presented sufficient evidence of fault to overcome defendants' motion for summary judgment.

I

In affirming the trial court's decision to grant defendants' motion for summary judgment, the Court of Appeals held that "[a] defamation plaintiff resisting a *media* defendant's motion for summary judgment must establish a prima facie case by evidence of *convincing clarity.*" (Some italics mine.) *LaMon v. Butler,* 44 Wn. App. 654, 657, 722 P.2d 1373 (1986). While noting correctly that this standard of proof was not required by the United States Supreme Court the Court of Appeals reasoned from recent opinions of this court that media defendants have greater protection than ordinary citizens similarly engaged in the exercise of First Amendment rights. *LaMon,* at 657 (citing *Dunlap v. Wayne,* 105 Wn.2d 529, 716

P.2d 842 (1986)). Such a conclusion is not warranted and should be corrected.

There are three problems with the media/nonmedia distinction in our current approach to standard of proof issues in libel law. Each of them strongly suggests that the distinction should be dropped.

A

SULLIVAN STANDARDS MISCONSTRUED

First, to the extent that the heightened standard of proof came to be applied as a result of state court interpretations of United States Supreme Court decisions, those decisions have been misconstrued. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964), the Court held that in defamation cases where the plaintiff is a public official, a prima facie case must be established with evidence of "convincing clarity", including a showing of actual malice. *Sullivan*, at 285-86. This twin standard of actual malice and convincing clarity was later extended to cases where the plaintiff is a "public figure". *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 18 L.Ed. 2d 1094, 87 S. Ct. 1975 (1967). We adopted these standards of fault and proof for public figure plaintiffs in *Grayson v. Curtis Pub'g Co.*, 72 Wn.2d 999, 436 P.2d 756 (1967). While only the plurality of the United States Supreme Court would have extended this twin standard to comments about private individuals which pertained to matters of "general public interest", *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971), this state nonetheless adopted the *Sullivan* standard for such comments because it felt

constitutionally bound to follow the *Rosenbloom* plurality. *Miller v. Argus Pub'g Co.*, 79 Wn.2d 816, 490 P.2d 101 (1971).

However, in reconsidering the issue 3 years later, the United States Supreme Court held that the *Sullivan* standards were not constitutionally mandated when the plaintiff was a private individual; hence, the states were free to provide greater protection to defamed private individuals than public figures. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). Once again following the cue from the United States Supreme Court, Washington modified the standard for private person plaintiffs in defamation actions against the media. In *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), this court overruled *Miller*. We stated that the *Sullivan* standard of liability "imposes a totally unacceptable burden" when applied to private plaintiffs and that, henceforth, such plaintiffs need only show ordinary negligence. *Taskett*, at 444.

Taskett only expressly addressed one aspect of the *Sullivan* twin standard, that of fault. The substantive evidentiary standard to be applied was left unstated. However, the logic which compelled us to adopted a lesser standard of liability for actions by private plaintiffs strongly suggests that the standard of proof should likewise be lower. To have the nature of the plaintiff determine the standard of liability but have the status of the defendant determine the standard of proof is confusing and inconsistent. Yet this is where our case law currently stands.

The higher standard of convincing clarity has occasionally been applied by state courts to suits by private persons even though the case authority applying this standard involved public officials or public figures. The first case applying this standard to a private individual was *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979). There the court stated that a plaintiff must present evidence "of a sufficient quantum to establish a prima facie case with convincing clarity." *Sims*, at 237. While following *Taskett* insofar as the standard of fault to be applied, the court applied the *Sullivan* standard of proof, even though Sims was a private citizen and traditionally entitled to greater protection of his reputation than a public figure. To support its application of the convincing clarity standard rather than that of simple preponderance, the court cited two Washington cases – *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973) and *Exner v. AMA*, 12 Wn. App. 215, 529 P.2d 863 (1974). However, both of these cases involved plaintiffs who were public figures for whom the application of the *Sullivan* standards of fault and proof was constitutionally compelled.

The application of this heightened evidentiary standard was challenged by the private plaintiff in *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982), but the argument was rejected by this court. We stated then that for "policy reasons, rooted in the First Amendment . . . an early testing of plaintiff's evidence by a convincing clarity burden continue to be persuasive." *Mark*, at 487. *Chase* was again cited as the source for this rule.

The last case in this evolution was *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986). There the court noted for the first time that the cases applying the "convincing clarity" standard had involved media defendants (although it is equally accurate to say that those cases, with the exception of *Sims* and *Mark*, involved plaintiffs who were either public officials or public figures) and that "First Amendment concerns at that time supported the special protection that we extended . . . " *Dunlap*, at 534. The court suggested that the same First Amendment concerns were not implicated when a nonmedia defendant was being sued for a statement about private affairs; thus, whenever a nonmedia defendant was involved "the usual rules governing summary judgment should control", presumably including a simple preponderance of the evidence standard. *Dunlap*, at 535. This media/nonmedia defendant distinction in defamation actions was reiterated without comment in *Guntheroth v. Rodaway*, 107 Wn.2d 170, 176, 727 P.2d 982 (1986) and is repeated in the majority opinion in the current case.

Thus, the convincing clarity standard of proof came to be applied in libel suits against media defendants as a result of mistaken interpretations of United States Supreme Court decisions.

B

CURRENT DISTINCTION IS CONTRARY TO THE FIRST AMENDMENT

Second, the media/nonmedia defendant distinction in defamation actions by private individuals is, as the LaMons argue, contrary to the First Amendment. Since

this court's media defendant distinction currently rests upon "policy reasons, rooted in the First Amendment", *Mark*, at 487, it is important to consider that a clear majority of the Justices on the United States Supreme Court and several federal courts addressing the issue have stated that the First Amendment does *not* support granting the media special protection beyond that available to individual citizens. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985), five Justices signed separate opinions explicitly concluding that the First Amendment requires the equal treatment of media and nonmedia defendants and a sixth, Chief Justice Burger, agreed with this conclusion. Justice White was emphatic in opposing any media/nonmedia distinction in defamation law.

> None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn. It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers . . . with the most misinformation and do the most damage to private reputation.

(Footnote omitted.) *Dun & Bradstreet*, at 773 (White, J., concurring).

In a dissenting opinion joined by three other members of the Court, Justice Brennan stated categorically that a media/nonmedia distinction in defamation law is

> irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . "

Dun & Bradstreet, at 781, quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). Justice Brennan further emphasized the problems in defining "media" and suggested that any definition would soon become obsolete. Thus, he concludes that in the context of defamation law,

> the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.

Dun & Bradstreet, at 784.

A clear majority of the United States Supreme Court unequivocally reject any media/nonmedia distinction in libel law. This conclusion has since been strongly supported by two federal appellate courts. *Garcia v. Board of Educ.*, 777 F.2d 1403, 1409-11 (10th Cir. 1985); *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986). The message is now loud and clear: distinguishing between media and nonmedia defendants in libel cases is contrary to the First Amendment. We should not continue to hold otherwise.

C
Washington Contitution

Third, even assuming that the states can give greater protection to media as opposed to nonmedia defendants without violating either the First or Fourteenth Amendments, it has not been determined whether the Washington Constitution does in fact provide for such a distinction. In *Dunlap*, this court noted that "the Washington Constitution may provide heightened protection to

media defendants". *Dunlap* at 534 n.1 (citing Const. art. 1, § 5 and *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984)). In the present case, this issue was not raised before the Court of Appeals. But that court nonetheless concluded from its evaluation of Washington case law and the footnote in Dunlap that the Washington Constitution "*does* provide heightened protection to media defendants". (Italics mine.) *LaMon*, at 657 n.2.

Such a definitive statement by the Court of Appeals is unwarranted. First, the language of article 1, section 5 is hardly unambiguous on this point. There is no differentiation between freedom of speech and press and, hence, no clear grounds for distinguishing levels of protection for comments from media and nonmedia sources. Second, the footnote cited in *Dunlap* goes only so far as to suggest that article 1, section 5 *may* provide heightened protection to the media in defamation cases. However, it was only a suggestion, was not essential to the holding in the case, and most importantly, has never been raised in arguments before this court. Third, the special protection provided by the "convincing clarity" evidentiary standard has not been sought by the media defendants in this case as a state constitutional right; it is the petitioners who raise the issue on appeal claiming that the state constitution affords no such enhanced protection. To allow the language of the Court of Appeals to stand granting state constitutional protection to the media which is not granted to individual citizens of the state is highly unsatisfactory. The media defendant has not urged its adoption and this court has not been presented with any arguments using the nonexclusive criteria of *State v. Gunwall*,

106 Wn.2d 54, 720 P.2d 808 (1986), or other reasons mandating heightened state constitutional protection.

The media/nonmedia defendant distinction in our defamation law should be dropped. The appropriate evidentiary standard should be governed solely by the nature of the plaintiff, in the same manner that we determine which standard of liability to apply. A public figure plaintiff would therefore need to prove actual malice by clear and convincing evidence and a private person would only need to show negligence by simple preponderance of the evidence. The status of the defendant is irrelevant.

It is altogether proper to make the nature of the plaintiff the determining factor. The two basic rationales for the strict *Sullivan* standards are the need to promote vigorous and robust debate on matters and personalities affecting public policy and the ability of public figures to use the media to rebut false statements made about them. However, neither of these rationales is implicated when a libel suit is brought by a private person.

Abolishing the media/nonmedia distinction would be consistent with recent decisions of the United States Supreme Court and federal courts of appeal which have clarified the standards since our earlier cases. It would also be consistent with this court's reasoning in *Taskett* where it adopted "ordinary negligence" as the standard of fault for defamation cases involving a private person suing a media defendant.

The distinction between media and nonmedia defendants is faulty and should no longer be employed. I believe that "the best way forward is to take two steps

back" and correct our mistake. The proper standard of proof in any libel action should depend solely on the nature of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986). Otherwise we perpetuate a body of law under which two defendants engaged in the same conduct may suffer vastly different penalties simply because one is a member of the media and the other is not.

II

The Court of Appeals determined, and the majority does not disagree, that the LaMons are private persons for purposes of this litigation. Thus, they would be entitled to recover if they can show by a preponderance of the evidence that the statements made about them were false, had a defamatory meaning, were made negligently by the defendant, and were not otherwise privileged communication. *See Guntheroth*, at 175; *Dunlap*, at 542. As the nonmoving party in a summary judgment proceeding, the LaMons are further entitled to have the evidence and all reasonable inferences construed in the light most favorable to them and against the defendants. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987). Applying the appropriate evidentiary standard, I believe that the LaMons have presented a prima facie case and are entitled to proceed to trial.

The Court of Appeals concluded that the LaMons had provided sufficient evidence to show all the elements of defamation except defendants' fault. That court ruled that the LaMons had not made a prima facie showing of

negligence and upheld summary judgment for the defendants. On this basis alone the majority affirms the decision.

The issue before us is whether there is sufficient evidence from which a trier of fact could reasonably conclude that defendants Butler and The Daily World *"knew or, in the exercise of reasonable care, should have known"* that the statements made about the LaMons were false. *Taskett*, at 445. While the majority, like the Court of Appeals, examines only the statements made regarding the assault conviction, the LaMons' cause of action actually rests upon three allegedly defamatory statements. In addition to the false statements regarding the convictions, Butler and The Daily World are alleged to have made false statements to the effect that the LaMons' civil rights litigation against the police chief was dismissed in federal court for being "frivolous" when in fact there was a substantial recovery, and to the effect that the civil rights suit was "connected" with the alleged assault incident when, in fact, there was no connection whatsoever.

These statements were made not once, but over the course of several years. Butler continued to make these statements even *after* the LaMons had notified her and The Daily World of their falsity. Although the statute of limitations limits the LaMons' suit to those statements published in September 1979 and April 1980, the record contains several other articles published before then containing the same defamatory remarks. The false statements that were made shortly after the reversal of LaMon's assault conviction may well have been the result of honest mistake. The LaMons are nonetheless entitled to argue that it is at least negligent and perhaps reflects

actual malice when the defendant reporter and newspaper persist in printing the same mistaken and defamatory comments for 7 years.

The strongest basis for the LaMons' action lies in the false reporting of an assault conviction in municipal court that was later reversed by dismissal in superior court. Butler says that after she heard of the superior court order dismissing the action against the LaMons, she did not know its effect on the municipal court conviction. However, Butler did not take the time to read the order herself. Butler Deposition, at 13. Had she done so, she would have noted that the Superior Court Judge ordered that the "above action be dismissed with prejudice"; and that the "above action" clearly referred to the City of Westport's assault charges against the LaMons, not merely the appeal of the municipal court conviction. Clerk's Papers, at 66.

Although our law has since change, the rule had been well established at the time the order was issued that dismissal of a superior court action voids a prior municipal conviction. *See State v. Buckman*, 51 Wn.2d 827, 322 P.2d 881 (1958). The majority's characterization of the superior court order as a "dismissal of Lorraine LaMon's appeal" is inexplicable when the language of the order is given its plain and simple meaning. Majority, at 195.

Butler asserts that she contacted the Westport city attorney regarding the implications of the dismissal. According to her unsupported recollection of the conversation, the city attorney told her that the original municipal court conviction still stood despite the Superior Court's dismissal of the case. Butler Deposition, at 13-14.

The majority is correct in stating that the LaMons offer no direct evidence that this conversation did not take place or that the city attorney said something other than what Butler now recalls. However, the LaMons have submitted evidence that it was the city attorney himself who initially proposed the order dismissing the case against them. Clerk's Papers, at 63. It is at least arguable that the same city attorney who proposed dismissing the case against the LaMons in the first place would not later tell a reporter that the assault conviction was not affected. This evidence and the reasonable inference from it presents a genuine issue of material fact sufficient to overcome the defendants' motion for summary judgment. For this reason we cannot accept Butler's version of events at face value.

The two other false statements made by the defendants in the publications at issue here further suggest that the LaMons have an adequate factual basis for their complaint. Butler continued to write that the LaMons' civil rights action against the police chief was dismissed as being "frivoulous", despite knowing that in fact the LaMons were successful in their suit in federal district court. In this instance, Butler cannot claim to have been unaware of the true facts of the case. The LaMons had earlier paid for several large advertisements, published in the same newspaper, reprinting verbatim the findings of fact and judgment of the federal District Court granting them relief and the memorandum opinion of the Ninth Circuit Court of Appeals affirming the judgment. Clerk's Papers, at 41. Butler admitted in her deposition that she knew of the advertisements. Butler Deposiiton, at 35. In addition, Butler falsely reported that the civil rights

action "steemmed from" and was "connected with" the assault conviction. She later admitted in deposition that she knew that the basis for the LaMons' suit against the police chief was a denial of equal protection and had nothing to do with the prior municipal court conviction. Butler Deposition, at 27-28.

It is difficult to reconcile these facts with the majority's conclusion that no trier of fact could reasonably find the defendants at fault. The LaMons clearly have sufficient evidence with which to proceed to trial. The Court of Appeals decision should be reversed and the case remanded for trial.

DORE and PEARSON. JJ., concur with UTTER, J.

LaMon vs. Butler

110 Wn.2d 216, 751 P.2d 842

[No. 53196-0. En Banc. March 10, 1988.]

EDWARD LAMON, ET AT, *Petitioners, v.* BETTY BUTLER, ET AL, *Respondents.*

[1] **Libel and Slander – Summary Judgment – Prima Facie Case – Necessity.** To overcome a motion for summary judgment, a plaintiff in a defamation action has the burden of setting forth specific, material facts, rather than conclusory allegations, sufficient for a trier of fact to find the existence of each element of defamation.

[2] **Judgment – Summary Judgment – Affidavit – Failure To Rebut – Effect.** When a party resisting a summary judgment motion fails to controvert facts provided to support the motion, a court will accept the facts as true.

Other Grounds – In General. An appellate court will uphold a correct judgment on any proper theory established by the pleadings and supported by proof in the record, even though the particular theory it relies on was not considered by the trial court.

[4] **Judges – Disqualification – Affidavit of Prejudice – Number of Affidavits – Colitigants.** All individual plaintiffs together or all individual defendants together constitute a single "party" for purposes of RCW 4.12.050, which limits a party to one affidavit of prejudice.

[5] **Statutes – Construction – Meaningful Interpretation.** A statute will not be interpreted in a manner which results in an absurdity.

[Note: Only 4 Justices concur in all of the above statements.]

DOLLIVER, J., concurs in the result only; UTTER and DORE, JJ., PEARSON, C.J., and GOODLOE, J., dissent by separate opinions.

Nature of Action: Defamation action against a newspaper reporter and her employer for publishing articles which stated that one of the plaintiffs had been convicted of assault in municipal court without mentioning that the prosecution later was dismissed in superior court.

Superior Court: The Superior Court for Grays Harbor County, No. 81-2-00748-8, John H. Kirkwood, J., on December 22, 1983, granted a summary judgment in favor of the defendants.

Court of Appeals: The court *affirmed* the judgment at 44 Wn. App. 654, holding that there was insufficient proof of fault and that a second affidavit of prejudice was properly dismissed.

Supreme Court: Holding that the plaintiffs had not made a prima facie showing of the defendants' negligence, that the issue of fault was properly before the court, and that the plaintiffs were not entitled to disqualify two trial court judges, the court *affirms* the decision of the Court of Appeals and the judgment.

Jack L. Burtch, for petitioners.

Brown, Edwards, Lewis & Janhunen, by *Curtis M. Janhunen,* for respondents.

P. Cameron DeVore, Marshall J. Nelson, and *Stuart R. Dunwoody* on behalf of Allied Daily Newspapers, amici curiae for respondents.

DURHAM, J. – The plaintiffs in this case sued a newspaper and one of its reporters for allegedly defamatory statements appearing in its news articles. The trial judge dismissed the plaintiffs' cause of action by summary judgment. The Court of Appeals affirmed, holding that the plaintiffs had failed to make a prima facie showing of the defendants' fault. Although our analysis differs somewhat from that of the Court of Appeals, we also affirm the trial court's decision.

On July 2, 1972, an altercation took place between Lorraine LaMon and John Peterson. Both Lorraine LaMon and her husband, Edward, were charged with assault. Edward LaMon's count was dismissed at trial, but Lorraine LaMon was convicted in the Westport Municipal Court. Lorraine LaMon appealed to the Grays Harbor County Superior Court. That appeal was dismissed by stipulation of the parties on November 10, 1972. The order of dismissal states that the superior court action

was dismissed with prejudice, but it does not expressly state what effect the dismissal would have on the lower court conviction. For purposes of this opinion, however, we assume that the lower court conviction was indeed negated.

At that time, Betty Butler was responsible for reporting news in the Westport area for The Daily World, a newspaper of general circulation in Grays Harbor County. Butler learned of the superior court's dismissal of Lorraine LaMon's appeal by calling the county clerk's office. A clerk there read the order to Butler over the telephone. Butler discussed the effect of that order with the Westport city attorney involved in Lorraine LaMon's appeal. The city attorney told her that the dismissal did not negate the municipal court conviction.

Based on her understanding of these events, Butler wrote at least five articles between 1974 and 1980 in which she mentioned Lorraine LaMon's municipal court conviction without also mentioning the superior court dismissal.[1] Those articles did not focus primarily on Lorraine LaMon's assault conviction, but instead concerned the status of related litigation. In that related litigation,

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[1] The five articles were dated August 13, 1974, September 15, 1975, September 11, 1979, September 25, 1979 and April 17, 1980. Because the first three articles were published more than 2 years before the LaMons filed their complaint, the statute of limitations bars any action on them. *See* RCW 4.16.100(1). The other two articles are the focus of this case.

Additionally, Butler helped to write a story that appeared in The Daily World on October 20, 1978, which stated that Lorraine LaMon's conviction was upheld on appeal. The 2-year statute of limitations prevents any action on this article as well.

the LaMons sued the Westport police chief, John Regan, for the false arrest arising out of the assault incident and for a failure to provide proper police protection to the LaMons over a number of years.[2] Butler's references to the assault conviction were used as background material in explaining the LaMon-Regan litigation.

The LaMons filed a complaint for defamation against Butler and The Daily World in Grays Harbor County Superior Court on September 24, 1981. The LaMons alleged that Butler's articles were defamatory by implying that Lorraine LaMon remained convicted of assault. Prior to trial, the LaMons unsuccessfully attempted to disqualify two Superior Court judges by filing affidavits of prejudice. Ultimately, Judge Kirkwood entered a summary judgment in favor of the defendants on December 22, 1983, dismissing the LaMons' cause of action. The Court of Appeals affirmed the dismissal, holding that the LaMons had failed to make a sufficient prima facie showing of the defendants' fault.[3] We granted the LaMons' petition for review.

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[2] The LaMons also named John Peterson as a defendant in that action, alleging that he executed an "erroneous and false" assault complaint against them. Peterson was later dismissed from the case on the motion of the LaMons.

[3] The Court of Appeals also concluded that the LaMons had succeeded in proving other elements of defamation by clear and convincing evidence, namely, falsity, defamatory meaning, and unprivileged communication. Because we hold that there was no triable issue as to the defendants' fault, we need not address the Court of Appeals discussion of the other elements.

SUMMARY JUDGMENT

Washington case law has set out certain principles to be applied in defamation cases. A defamation plaintiff must prove the following elements: a defamatory and false statement, an unprivileged communication, fault, and damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982); *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 233, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979); Restatement (Second) of Torts § 558 (1977). If the plaintiff is a public figure or public official, then the level of fault that he must show is actual malice. If, on the other hand, the plaintiff is a private figure, then he need show only negligence. *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976). Finally, this court has recently held that a defamation plaintiff's standard of proof depends on the status of the defendant. The standard of proof is "clear and convincing evidence" against a media defendant, and "a preponderance of the evidence" against a nonmedia defendant regarding private affairs. *See Guntheroth v. Rodaway*, 107 Wn.2d 170, 175-76, 727 P.2d 982 (1986); *Dunlap v. Wayne*, 105 Wn.2d 529, 534-35, 716 P.2d 842 (1986); *Mark*, at 486-87.

The parties have presented numerous arguments as to the proper application of these principles. The LaMons have argued they are private figures, while The Daily World has argued they are public figures. The LaMons challenged the media/nonmedia distinction as violating First Amendment principles. An amicus curiae brief filed on behalf of Allied Daily Newspapers has proposed that this court apply the higher standard of proof to issues of

public concern and the lower standard to issues of private concern. However, because our holding does not require resolution of these questions, we decline to address them. Even if we were to agree with the LaMons' position on all these issues, they would still have the burden at summary judgment of showing by a preponderance of the evidence that Butler and The Daily World acted negligently. This they have failed to do.

[1] When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements of defamation. *See Guntheroth*, at 175; *Dunlap*, at 542; *Mark*, at 486. The prima facie case must consist of specific, material facts, rather than conclusory statements that would allow a jury to find that each element of defamation exists. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); *Guntheroth*, at 175. The nonmoving party is entitled to have the evidence viewed in a light most favorable to him and against the moving party. *Herron*, at 170.

The only evidence the LaMons have submitted to show the defendants' negligence is Lorraine LaMon's affidavit, in which she concludes that Butler knew that the statements were false because the order of dismissal was read to her over the telephone. Lorraine LaMon implies that Butler should be charged with knowledge of the order's contents, and we agree. However, the order of dismissal does not on its face give any indication of its effect on the municipal court conviction. The order indicates only that the superior court section is dismissed. The most that can be said is that reading the order would put one on notice to inquire further. The record shows,

however, that Butler did, in fact, inquire further. She discussed the order with the city attorney involved in the case. According to Butler's deposition the city attorney told her that the superior court dismissal did not affect Lorraine LaMon's conviction. Accordingly, Butler had no way of knowing that her statements were incorrect.

[2] These facts do not constitute a prima facie case of negligence, even if we consider all the evidence and all the reasonable inferences from the evidence in favor of the LaMons. The LaMons are not entitled to an inference that the city attorney might have told Butler something other than what Butler now remembers. The LaMons did not present any evidentiary material to controvert Butler's version of the city attorney's statements. When a nonmoving party fails to controvert the facts supporting a summary judgment motion, those facts are accepted as true. *See Washington Osteopathic Med. Ass'n v. King Cy. Med. Serv. Corp.*, 78 Wn.2d 577, 579, 478 P.2d 228 (1970); *see also Zurita v. Virgin Islands Daily News*, 578 F. Supp. 306, 309 (D.V.I. 1984); *Hideout Records & Distribs. v. El Jay Dee, Inc.*, 601 F. Supp. 1048, 1053 (D. Del. 1984) (and cases cited therein). A reasonable trier of fact could reach but one conclusion from this evidence: the defendants did not act negligently. Accordingly, the LaMons did not present a prime facie case on the issue of fault, and summary judgment was properly entered against them.[4]

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[4] Our decision today does not violate the LaMons' constitutional right to a jury trial. Const. art. 1, § 21. We are well aware that summary judgment decisions should not involve the resolution of factual issues. Such is the province of the fact

(Continued on following page)

SCOPE OF ISSUES ON APPEAL

The LaMons have argued that it would be unfair for their case on appeal to be decided on the issue of fault. They contend that they did not have notice that the summary judgment hearing would include the issue of fault, because neither the trial judge nor the defendants addressed it below. They conclude that it would be unfair for this court to decide the appeal on the fault issue when it was not argued below.

We find this argument to be without merit. First, the LaMons were furnished with notice that they had to present a prima facie case on the issue of fault in order to survive the defendants' summary judgment motion. The defendants' memorandum in support of summary judgment quoted the following language from *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982):

> Under our cases, a defamation plaintiff must show four essential elements: falsity, an

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finder at trial. Yet, Washington courts have held many times that summary judgment should be granted when reasonable persons, giving all reasonable inferences to the nonmoving party, could only conclude that the moving party is entitled to judgment. In such cases there is no genuine issue of material fact. *See e.g., Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). When there is no genuine issue of material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial. *See Nave v. Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966), *appeal dismissed*, 385 U.S. 450 (1967); *Diamond Door Co. v, Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974).

> unprivileged communication, fault, and damages. To make out a prima facie case for purposes of avoiding a summary judgment in favor of respondents, Mark would have to allege as to each element facts which would raise a genuine issue of fact for the jury.

(Citations omitted.) *Mark*, at 486. By reading this memorandum, the LaMons received notice that if they did not present evidence on the issue of fault, they ran the risk of summary judgment being entered against them.

[3] Second, an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). The pleadings establish a defamation cause of action, an essential element of which is the defendants' fault. Therefore, dismissal for a failure to satisfy the burden of proving fault is based on a theory established by the pleadings. Furthermore, this theory is supported by proof in the record most notably Butler's deposition, which was uncontroverted by the LaMons. We conclude that the fault issue was properly before us.

Affidavits of Prejudice

The final issue in this case concerns affidavits of prejudice. Affidavits of prejudice are the means by which litigants in this state can prevent a judge who they perceive to be biased from hearing their case. Affidavits of prejudice are governed by RCW 4.12.040 and 4.12.050, which provide in relevant part:

> No judge of a superior court of the state of Washington shall sit to hear or try any action or

> proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.

. . .

RCW 4.12.040.

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge . . .

RCW 4.12.050.

We have summarized the effect of these statutes as follows:

> Under these statutes and under our decisions a party litigant is entitled, as a matter of right, to a change of judges upon the timely filing of a motion and affidavit of prejudice against a judge about to hear his cause or any substantial portion thereof on the merits. Such a motion and affidavit seasonably filed presents no question of fact or discretion. Prejudice is deemed to be established by the affidavit and the judge to whom it is directed is divested of authority to proceed further into the merits of the action.

State v. Dixon, 74 Wn.2d 700, 702, 446 P.2d 329 (1968).

However, the right to file affidavits of prejudice is not unlimited: "[N]o party or attorney shall be permitted to make more than one such application in any action or

proceeding under this section and RCW 4.12.040." RCW 4.12.050.

In this case, Lorraine LaMon filed an affidavit of prejudice against Judge Kirkwood and Edward LaMon filed an affidavit of prejudice against Judge Schumacher.[5] The LaMons argue that because they are each parties, they each have independent rights to file affidavits of prejudice under RCW 4.12.050.

[4, 5] Analysis of this issue revolves around the interpretation of "party" in RCW 4.12.050. Are co-plaintiffs each parties to an action, or instead, do they together constitute one party? This is apparently an issue of first impression in this state. The term "party" is not defined in RCW 4.12.050. However, one of the definitions of "party" in Black's Law Dictionary reads as follows:

> "Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, *the party plaintiff or defendant, whether composed of one or more individuals* and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.

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[5] The record does not disclose the disposition of the affidavit filed against Judge Schumacher. Since Judge Kirkwood ultimately ruled on the case, he evidently refused to recuse himself.

(Italics ours.) Black's Law Dictionary 1010 (5th ed. 1979).[6] Under this definition, the LaMons together would constitute a single party.

This same result has been reached by the Oregon Supreme Court when interpreting a statute similar to ours. The Oregon statute provided that "no party or attorney shall be permitted to make more than two applications in any action or proceeding under this act." *U'Ren v. Bagley*, 118 Or. 77, 85, 245 P. 1074, 46 A.L.R. 1173 (1926) (quoting section 45-3, Oregon Laws). The Oregon Supreme Court interpreted the term "party" in this statute in the following manner:

> "Party" means either plaintiff or defendant, and includes all persons belonging to the particular class: 40 Cyc[lopedia of Law and Procedure] 146 [(1912)]. "Party" is used in a collective sense and if there be a plurality of plaintiffs, they are all only one party litigant.

U'Ren, at 85. *See also* 46 Am. Jur. 2d *Judges* § 212 (1969).

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[6] Black's Law Dictionary also provides a less restrictive definition of "party", which reads:

> A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A "party" to an action is a person whose name is designated on record as plaintiff or defendant. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment.

(Citation omitted.) Black's Law Dictionary, at 1010. As we explain later in this opinion, we decline to use such an expansive definition of "party" in construing RCW 4.12.050.

We find this holding to be persuasive. If we were to hold that each plaintiff and each defendant were entitled to file an affidavit of prejudice, then scores of judges could be disqualified in a single case. The Legislature could not have intended that result. Statutes must be interpreted so as to avoid absurd results. *General Tel. Co. v. Utilities & Transp. Comm'n*, 104 Wn.2d 460, 471, 706 P.2d 625 (1985). Therefore, we hold that the language of RCW 4.12.050 limits co-plaintiffs or co-defendants to the filing of a single affidavit. The LaMons were only entitled to file a single affidavit of prejudice.[7]

The trial court's decision is affirmed.

BRACHTENBACH, ANDERSEN, and CALLOW, JJ., concur.
DOLLIVER, J., concurs in the result.

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[7] The LaMons argue that even if they were entitled to file only one affidavit of prejudice, then Judge Kirkwood should have disqualified himself upon receiving Lorraine LaMon's affidavit of prejudice. The premise underlying this argument is that Judges Schumacher and Kirkwood should have given priority to Lorraine LaMon's affidavit of prejudice, presumably because the cause of action was more hers than Edward's. However, there was no reason for the judges to do so. Both of the LaMons were named as plaintiffs in the case; therefore, either one had the right to file the single affidavit to which they were jointly entitled. Because they each had this right, the judges had no way of knowing which affidavit was controlling. There is no evidence in the record to show that the LaMons indicated that one affidavit had priority over the other. Accordingly, we cannot conclude that Judge Kirkwood erred in hearing this case.

UTTER, J. (dissenting) – I dissent on two grounds. First, this court should unequivocally reject the distinction between media/nonmedia defendants in determining the applicable standard of proof in libel cases. The majority states that the standard of proof depends upon the status of the defendant: "clear and convincing evidence" against a media defendant and "preponderance of the evidence" against a nonmedia defendant. Majority, at 220. To perpetuate this distinction, even while stating that it would not make any difference in deciding this case, majority, at 221, only lends confusion to an area of law that desperately needs greater clarity.

Second, I believe that the LaMons have presented sufficient evidence of fault to overcome defendant's motion for summary judgment. I concur with the conclusions reached on these arguments by Justice Dore in his dissenting opinion and offer further arguments in support of them here.

I

In affirming the trial court's decision to grant defendants' motion for summary judgment, the Court of Appeals held that "[a] defamation plaintiff resisting a *media* defendant's motion for summary judgment must establish a prima facie case by evidence of *convincing clarity*." (Some italics mine.) *LaMon v. Butler*, 44 Wn. App. 654, 657, 722 P.2d 1373 (1986)). While noting correctly that this standard of proof was not required by the United States Supreme Court, the Court of Appeals reasoned from recent opinions of this court that media defendants have greater protection than ordinary citizens similarly

engaged in the exercise of First Amendment rights. *LaMon*, at 657 (citing *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986). Such a conclusion is not warranted and should be corrected.

There are three problems with the media/nonmedia distinction in our current approach to standard of proof issues in libel law. Each of them strongly suggests that the distinction should be dropped.

A

Sullivan Standards Misconstrued

First, to the extent that the heightened standard of proof came to be applied as a result of state court interpretations of United States Supreme Court decisions, those decisions have been misconstrued. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964), the Court held that in defamation cases where the plaintiff is a public official, a prima facie case must be established with evidence of "convincing clarity", including a showing of actual malice. *Sullivan*, at 285-86. This twin standard of actual malice and convincing clarity was later extended to cases where the plaintiff is a "public figure". *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). We adopted these standards of fault and proof for public figure plaintiffs in *Grayson v. Curtis Pub'g Co.*, 72 Wn.2d 999, 436 P.2d 756 (1967). While only the plurality of the Court would have extended this twin standard to comments about private individuals which pertained to matters of "general public interest", *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct.

1811 (1971), this state nonetheless adopted the *Sullivan* standard for such comments because we felt constitutionally bound to follow the *Rosenbloom* plurality. *Miller v. Argus Pub'g Co.*, 79 Wn.2d 816, 490 P.2d 101 (1971).

However, in reconsidering the issue 3 years later, the United States Supreme Court held that the *Sullivan* standards were not constitutionally mandated when the plaintiff was a private individual; hence, the states were free to provide greater protection to defamed private individuals than to public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). Once again following the cue from United States Supreme Court, Washington modified the standard for private person plaintiffs in defamation actions against the media. In *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), this court overruled *Miller*. We stated that the *Sullivan* standard of liability "imposes a totally unacceptable burden" when applied to private plaintiffs and that, henceforth, such plaintiffs need only show ordinary negligence. *Taskett*, at 444.

Taskett expressly addressed only one aspect of the *Sullivan* twin standard, that of fault. The substantive evidentiary standard to be applied was left unstated. However, the logic which compelled us to adopt a lesser standard of liability for actions by private plaintiffs strongly suggests that the standard of proof should likewise be lower. To have the nature of the plaintiff determine the standard of liability but have the status of the defendant determine the standard of proof is confusing and inconsistent. Yet this is where our case law currently stands.

The higher standard of convincing clarity has occasionally been applied by state courts to suits by private persons even though the case authority applying this standard involved public officials or public figures. The first case applying this standard to a private individual was *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979). There the court stated that a plaintiff must present evidence "of a sufficient quantum to establish a prima facie case with convincing clarity." *Sims*, at 237. While following *Taskett* insofar as the standard of fault to be applied, the court applied the *Sullivan* standard of proof, even though Sims was a private citizen and traditionally entitled to greater protection of his reputation than a public figure. To support its application of the convincing clarity standard rather than that of simple preponderance, the court cited two Washington cases – *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973) and *Exner v. AMA*, 12 Wn. App. 215, 529 P.2d 863, 75 A.L.R.3d 603 (1974). However, both of these cases involved plaintiffs who were public figures for whom the application of the *Sullivan* standards of fault and proof was constitutionally compelled.

The application of this heightened evidentiary standard was later challenged by the private plaintiff in *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982), but the argument was rejected by this court. We stated then that for "policy reasons, rooted in the First Amendment . . . an early testing of plaintiff's evidence by a convincing clarity burden continue to be persuasive." *Mark*, at 487. *Chase* was again cited as the source for this rule.

The last case in this evolution was *Dunlap v. Wayne*, 105 Wn.2d, 716 P.2d 529, 842 (1986). There we noted for the first time that the cases applying the "convincing clarity" standard had involved media defendants (although it is equally accurate to say that those cases, with the exception of *Sims* and *Mark*, involved plaintiffs who were either public officials or public figures) and that "First Amendment concerns at that time supported the special protection that we extended . . . " *Dunlap*, at 534. The court suggested that the same First Amendment concerns were not implicated when a nonmedia defendant was being sued for a statement about private affairs; thus, whenever a nonmedia defendant was involved "the usual rules governing summary judgment should control", presumably including a simple preponderance of the evidence standard. *Dunlap*, at 535. This media/nonmedia defendant distinction in defamation actions was reiterated without comment in *Guntheroth v. Rodaway*, 107 Wn.2d 170, 176, 727 P.2d 982 (1986) and is repeated in the majority opinion in the current case.

Thus, the convincing clarity standard of proof came to be applied in libel suits against media defendants as a result of mistaken interpretations of United States Supreme Court decisions.

B

CURRENT DISTINCTION IS CONTRARY TO THE FIRST AMENDMENT

Second, the media/nonmedia defendant distinction in defamation actions by private individuals is contrary to the First Amendment. Since this court's media defendant distinction currently rests upon "policy reasons,

rooted in the First Amendment", *Mark*, at 487, it is important to consider that a clear majority of the Justices on the United States Supreme Court and several federal courts addressing the issue have stated that the First Amendment does *not* support granting the media special protection beyond that available to individual citizens. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985), five Justices signed separate opinions explicitly concluding that the First Amendment requires the equal treatment of media and nonmedia defendants and a sixth, Chief Justice Burger, agreed with this conclusion. Justice White was emphatic in opposing any media/nonmedia distinction in defamation law.

> None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn. It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers . . . with the most misinformation and do the most damage to private reputation.

(Footnote omitted.) *Dun & Bradstreet*, at 773 (White, J., concurring).

In a dissenting opinion joined by three other members of the Court, Justice Brennan stated categorically that a media/nonmedia distinction in defamation law is

> irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . "

Dun & Bradstreet, at 781, quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777, 55 L. Ed. 2d 707, 98 S. Ct. 1407

(1978). Justice Brennan further emphasized the problems in defining "media" and suggested that any definition would soon become obsolete. Thus, he concludes that in the context of defamation law,

> the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.

Dun & Bradstreet, at 784.

A clear majority of the United States Supreme Court unequivocally rejects any media/nonmedia distinction in libel law. This conclusion has since been strongly supported by two federal appellate courts. *Garcia v. Board of Educ.*, 777 F.2d 1403, 1409-11 (10th Cir. 1985); *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986). The message is now loud and clear: distinguishing between media and nonmedia defendants in libel cases is contrary to the First Amendment. We should not continue to hold otherwise.

C

Washington Constitution

Third, even assuming that the states can give greater protection to media than to nonmedia defendants without violating either the First or Fourteenth Amendments, it has not been determined whether the Washington Constitution does in fact provide for such a distinction. In *Dunlap*, this court noted that "the Washington Constitution may provide heightened protection to media defendants." *Dunlap*, at 534 n.1 (citing Const. art. 1, § 5 and *State v. Coe*, 101 Wn.2d 364, 679 p.2d 353 (1984)). In the

present case, this issue was not raised before the Court of Appeals. But that court nonetheless concluded from its evaluation of Washington case law and the footnote in *Dunlap* that the Washington Constitution "*does* provide heightened protection to media defendants". (Italics mine.) *LaMon*, at 657 n.2.

Such a definitive statement by the Court of Appeals is unwarranted. First, the language of article 1, section 5 is hardly unambiguous on this point. There is no differentiation between freedom of speech and press and, hence, no clear grounds for distinguishing levels of protection for comments from media and nonmedia sources. Second, the footnote cited in *Dunlap* goes only so far as to suggest that article 1, section 5 *may* provide heightened protection to the media in defamation cases. However, it was only a suggestion, was not essential to the holding in the case, and, most importantly, has never been raised in arguments before this court. Third, the special protection provided by the "convincing clarity" evidentiary standard has not been sought by the media defendants in this case as a state constitutional right; it is the petitioners who raise the issue on appeal claiming that the state constitution affords no such enhanced protection. To allow the language of the Court of Appeals to stand granting state constitutional protection to the media which is not granted to individual citizens of the state is highly unsatisfactory. The media defendant has not urged its adoption and this court has not been presented with any arguments using the nonexclusive criteria of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), or other reasons mandating heightened state constitutional protection.

The media/nonmedia defendant distinction in our defamation law should be dropped. The appropriate evidentiary standard should be governed solely by the nature of the plaintiff, in the same manner that we determine which standard of liability to apply. A public figure plaintiff would therefore need to prove actual malice by clear and convincing evidence and a private person would only need to show negligence by simple preponderance of the evidence. The status of the defendant is irrelevant.

It is altogether proper to make the nature of the plaintiff the determining factor. The two basic rationales for the strict *Sullivan* standards are the need to promote vigorous and robust debate on matters and personalities affecting public policy and the ability of public figures to use the media to rebut false statements made about them. Neither of these rationales is implicated when a libel suit is brought by a private person.

Abolishing the media/nonmedia distinction would be consistent with recent decisions of the United States Supreme Court and federal courts of appeal which have clarified the standards since our earlier cases. It would also be consistent with this court's reasoning in *Taskett* where it adopted "ordinary negligence" as the standard of fault for defamation cases involving a private person suing a media defendant.

The distinction between media and nonmedia defendants is faulty and should no longer be employed. I believe that "the best way forward is to take two steps back" ~~and correct~~ our mistake. The proper standard of proof in any libel action should depend solely on the

nature of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Otherwise we perpetuate a body of law under which two defendants engaged in the same conduct may suffer vastly different penalties simply because one is a member of the media and the other is not.

II

The Court of Appeals determined, and the majority does not disagree, that the LaMons are private persons for purposes of this litigation. Thus, they would be entitled to recover if they can show by a preponderance of the evidence that the statements made about them were false, had a defamatory meaning, were made negligently by the defendant, and were not otherwise privileged communication. *See Guntheroth*, at 175; *Dunlap*, at 542. As the nonmoving party in a summary judgment proceeding, the LaMons are further entitled to have the evidence and all reasonable inferences construed in the light most favorable to them and against the defendants. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987). Applying the appropriate evidentiary standard, I believe that the LaMons have presented a prima facie case and are entitled to proceed to trial.

The Court of Appeals concluded that the LaMons had provided sufficient evidence to show all the elements of defamation except defendants' fault. That court ruled that the LaMons had not made a prima facie showing of negligence and upheld summary judgment for the defendants. On this basis alone the majority affirms the decision.

The issue before us is whether there is sufficient evidence from which a trier of fact could reasonably conclude that defendants Butler and The Daily World *"knew or, in the exercise of reasonable care, should have known"* that the statements made about the LaMons were false. *Taskett*, 86 Wn.2d at 445. While the majority, like the Court of Appeals, examines only the statements made regarding the assault conviction, the Lamons' cause of action actually rests upon three allegedly defamatory statements. In addition to the false statements regarding the convictions, Butler and The Daily World are alleged to have made false statements to the effect that the LaMons' civil rights litigation against the police chief was dismissed in federal court for being "frivolous" when in fact there was a substantial recovery, and to the effect that the civil rights suit was "connected" with the alleged assault incident when, in fact, there was no connection whatsoever.

These statements were made not once, but over the course of several years. Butler continued to make these statements even *after* the LaMons had notified her and The Daily World of their falsity. Although the statute of limitations limits the LaMons' suit to those statements published in September 1979 and April 1980, the record contains several other articles published before then containing the same defamatory remarks. The false statements that were made shortly after the reversal of LaMon's assault conviction may well have been the result of honest mistake. The LaMons are nonetheless entitled to argue that it is at least negligent and perhaps reflects

actual malice when the defendant reporter and newspaper persist in printing the same mistaken and defamatory comments for 7 years.

The strongest basis for the LaMons' action lies in the false reporting of an assault conviction in municipal court that was later reversed by dismissal in superior court. Butler stated that after she heard of the superior court order dismissing the action against the LaMons, she did not know its effect on the municipal court conviction. However, Butler did not take the time to read the order herself. Butler Deposition, at 13. Had she done so, she would have noted that the superior court judge ordered that the "above action be dismissed with prejudice"; and that the "above action" clearly referred to the City of Westport's assault charges against the LaMons, not merely the appeal of the municipal court conviction. Clerk's Papers, at 66.

Although our law has since changed, the rule had been well established at the time the order was issued that dismissal of a superior court action voids a prior municipal conviction. *See State v. Buckman*, 51 Wn.2d 827, 322 P.2d 881 (1958). The majority's characterization of the superior court order as a "dismissal of Lorraine LaMon's appeal" is inexplicable when the language of the order is given its plain and simple meaning. Majority, at 218.

Butler asserts that she contacted the Westport city attorney regarding the implications of the dismissal. According to her unsupported recollection of the conversation, the city attorney told her that the original municipal court conviction still stood despite the superior court's dismissal of the case. Butler Deposition, at 13-14.

The majority is correct in stating that the LaMons offer no direct evidence that this conversation did not take place or that the city attorney said something other than what Butler now recalls. However, the LaMons have submitted evidence that it was the city attorney himself who initially proposed the order dismissing the case against them. Clerk's Papers, at 63. It is at least arguable that the same city attorney who proposed dismissing the case against the LaMons in the first place would not later tell a reporter that the assault conviction was not affected. This evidence and the reasonable inference from it presents a genuine issue of material fact sufficient to overcome the defendant's motion for summary judgment. For this reason we cannot accept Butler's version of events at face value.

The two other false statements made by the defendants in the publications at issue here further suggest that the LaMons have an adequate factual basis for their complaint. Butler continued to write that the LaMons' civil rights action against the police chief was dismissed as being "frivolous", despite knowing that in fact the LaMons were successful in their suit in federal district court. In this instance, Butler cannot claim to have been unaware of the true facts of the case. The LaMons had earlier paid for several large advertisements, published in the same newspaper, reprinting verbatim the findings of fact and judgment of the federal district court granting them relief and the memorandum opinion of the Ninth Circuit Court of Appeals affirming the judgment. Clerk's Papers, at 41. Butler admitted in her deposition that she knew of the advertisements. Butler Deposition, at 35. In addition, Butler falsely reported that the civil rights

action "stemmed from" and was "connected with" the assault conviction. She later admitted in deposition that she knew that the basis for the LaMons' suit against the police chief was a denial of equal protection and had nothing to do with the prior municipal court conviction. Butler Deposition, at 27-28.

It is difficult to reconcile these facts with the majority's conclusion that no trier of fact could reasonably find the defendants at fault. The LaMons clearly have sufficient evidence with which to proceed to trial. The Court of Appeals decision should be reversed and the case remanded for trial.

PEARSON, C.J., and GOODLOE, J., concur with UTTER, J.

DORE, J. (dissenting) – The majority holds that the LaMons have not established a prima facie case of negligence with respect to this defamation action, and therefore uphold a summary judgment motion dismissing the case. I believe that whether or not such negligence was present is a question of fact, which cannot be resolved by summary judgment. I dissent, as I would remand this case for trial to decide whether or not Butler and The Daily World were negligent when publishing the false and defamatory statement in their newspaper.

PROPER STANDARD OF REVIEW

The majority opinion implicitly supports a position that "a defamation plaintiff's standard of proof depends on the status of the defendant." Majority, at 220. The majority holds that a plaintiff must present a prima facie case with "clear and convincing" evidence against a

media defendant, but only by a "preponderance of the evidence" against nonmedia defendants. While admittedly the majority states that the LaMons cannot even meet the preponderance of evidence standard of proof – a result I believe is clearly wrong – its failure to clarify this issue of the proper standard of review is inexcusable considering the recent United States Supreme Court case in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985). In *Dun & Bradstreet*, five justices explicitly held that any distinction between media and nonmedia defendants violated the First Amendment. *Dun & Bradstreet*, 472 U.S. at 765, 773 (White, J., concurring), 472 U.S. at 774, 781 (Brennan, J., dissenting). Subsequent federal courts, following the decision in *Dun & Bradstreet*, have rejected this media/nonmedia distinction. *See Garcia v. Board of Educ.*, 777 F.2d 1403, 1409-10 (10th Cir. 1985); *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986).

Therefore, if the evidence presented by the LaMons, and all reasonable inferences which can be drawn from that evidence, establishes a prima facie case of defamation by a preponderance of the evidence, the motion for summary judgment should be denied. I believe that in this case such a prima facie cause of action has been established.

Negligent Conduct

The majority concludes that the LaMons have not established that Butler acted negligently. I disagree. Butler asserts that after she was read the superior court order, she did not know its effect on Lorraine LaMon's

municipal court assault conviction. She further asserts that she then contacted the Westport City Attorney's Office, which supposedly informed her that the Superior Court's dismissal did not affect the original assault conviction. I find this explanation strains credulity, and I believe that a trial is required to determine whether Butler was negligent.

The superior court order dismissing the municipal court action read as follows:

> This cause coming on for hearing on motion of the defendants by and through their attorney of record, . . . to dismiss the action and the same being stipulated by counsel, [attorneys] for plaintiff, and the Court being fully advised in the premises, it is ordered that the said motion be and the same is hereby granted: It is ordered that the above action be dismissed with prejudice. It is further ordered, adjudged and decreed that the defendants pay all costs in the matter.

Clerk's Papers, at 66. I do not believe that any lawyer could read this order and not conclude that the original conviction was reversed. Either Butler has fabricated the results of her conversation with the Westport City Attorney's Office, or she mischaracterized the order when she talked with that office. In either event, a fact finder could certainly find her actions negligent, and this case should therefore not be disposed of by summary judgment.

Conclusion

I dissent to the majority opinion. I believe the majority fails to clarify the proper standard of proof which the LaMons must meet to resist the motion for summary

judgment. I would hold that there is a genuine issue of fact as to whether Butler's conduct was negligent. I would remand for trial.

Reconsideration granted July 6, 1988.

APPENDIX D

SUPERIOR COURT OF THE STATE OF WASHINGTON
GRAYS HARBOR COUNTY

John H. Kirkwood
Judge – Dept. 1 – 249-5140

Court House
Montesano, WA 98563

John W. Schumacher
Judge – Dept. 2 – 249-3812

December 20, 1983

Mr. Jack L. Burtch
Attorney at Law
P.O. Box A
Aberdeen, Washington 98520

Aiken, St. Louis and Siljeg
Attorneys at Law
1215 Norton Building
Seattle, Washington 98104

(RECEIVED DEC 21)

Re: LaMON v. WESTPORT, Grays Harbor County Cause No. 73736

Gentlemen:

Defendants' second motion for summary judgment is granted.

Very truly yours,

/s/ John H. Kirkwood
John H. Kirkwood, Judge

JHK:ml
cc: File

IN THE SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

EDWARD LaMON and LORRAINE LaMON, husband and wife,	NO. 73736
Plaintiffs,	ORDER GRANTING SUMMARY JUDGMENT
vs.	
CITY OF WESTPORT, a municipal corporation; BILL WADE, JR., and JANE DOE WADE, his wife; ORVILLE ENGLE and JANE DOE ENGLE, his wife; FRANK SCHNIDER and JANE DOE SCHNIDER, his wife; GARY PEDERSEN and JANE DOE PEDERSEN his wife; CHERYL AHERN and JOHN DOE AHERN, her husband; GLEYN BLEDSOE and JANE DOE BLEDSOE, his wife; and JOHN J. REGAN and MABEL REGAN, his wife,	
Defendants.	

THIS MATTER having come on before the undersigned Judge of the above-entitled Court, and the Court having considered the records and files herein, memoranda of counsel submitted in support of and in opposition to defendants' second motion for summary judgment, the various affidavits filed in connection therewith, and being in all respects otherwise fully advised in the premises,

IT IS HEREBY ORDERED that defendants' second motion for summary judgment be, and hereby is, granted, and that plaintiffs' complaint be, and hereby is, dismissed in its entirety as against all defendants with prejudice and without costs.

DATED this 9th day of January, 1984.

/s/ John W. Kirkwood
JUDGE

Presented by:

AIKEN, ST. LOUIS & SILJEG

Steven Soha
Attorneys for Defendants

Approved as to form, notice of presentation waived:

Jack L. Burtch
Attorney for Plaintiffs

APPENDIX E

In the Superior Court of the State of Washington

In and For Grays Harbor County

Edward LaMon, et al.,	)	
PLAINTIFF/PETITIONER	)	No. 73736
vs.	)	Order ___
City of Westport, et al.,	)	(Filed Jan. 9, 1984)
DEFENDANT/RESPONDENT	)	

(X) On motion of the defendants for summary judgment and plaintiffs' for motion to amend complaint.

( ) By stipulation of the parties,

( ) It appearing that the ___ has been duly served and is in default,

IT IS ORDERED: both motions are denied, the motion for summary judgment being dismissed is defendants first motion for summary judgment.

DATED January 9, 1984.

Presented by:

_____

Attorney for _____

_____

Approved for entry
Attorney for _____

/s/ John H. Kirkwood
JUDGE

APPENDIX F

C. ISSUES PRESENTED FOR REVIEW

(1) May a court grant respondent affirmative relief from an order denying summary judgment where respondent did not timely file a notice of appeal or a notice for discretionary review, but filed a notice of claim of error or appeal pursuant to RAP 2.5?

(2) If the court is going to consider an order denying summary judgment on the issue of publication of the defamatory matter without a cross-appeal can it do so without requiring certification by the trial court as to the matters considered in denying summary judgment on this question?

* * *

On January 27, 1984, The defendants filed a notice of claim of error on appeal pursuant to RAP 2.5. (SOHA CP 141-142). The defendants never filed a cross-appeal.

On April 30, 1984, the court certified the matters that the court considered in ruling in favor of defendants on the second motion for summary judgment. A copy of that certificate is included in the appendix. It should be noted that no where in the certificate is there any reference to any depositions as having been considered by the court in ruling on the motion on summary judgment where it granted summary judgment to the defendants on their second motion for summary judgment. Since there was no cross-appeal, most of the material that was brought to the attention of the judge by petitioners for the purpose of ruling on the first motion for summary judgment

regarding publication was not made part of the record in the appellate court.

The Court of Appeals in its decision applied the usual rules for summary judgment. It assumed for the purpose of the appeal that the LaMON's met their burden regarding a defamatory and false statement, found that the publication was unprivileged, but ruled against the LaMONS on an issue which was not rightfully before the court, to wit, publication.

At the oral argument before the Court of Appeals, the attorney for the appellants pointed out to the court that there had not been a cross-appeal by the defendants in this action, and that he did not feel that publication was an issue before the court. The attorney at that time indicated to the court that if they thought there was an issue on publication before the court that the record should be supplemented regarding this, and asked for an opportunity to address it in a supplemental brief. No response was made by the court.

Despite RAP 9.10 and 9.12, the appellate court in fact ruled against the petitioners on the question of publication, without having a complete record before it regarding this issue, and without having before it certification by the judge as to what the judge had considered in denying the first motion for summary judgment which was based on an alleged lack of publication.

After the trial court had certified the matters that he had considered for the purpose of granting the second motion for summary judgment, the attorney for the defendants caused additional material in the form of clerks papers to be filed with the appellate court. This

material did not include all the material that had been considered by the judge in denying the motion for summary judgment based on lack of publication.

It should be clear that the trial court denied summary judgment on the alleged lack of publication. Judges letter denying defendants motion for summary judgment. (SOHA CP 7). Order entered January 9, 1984 denying first motion for summary judgment and entering summary judgment of dismissal on second motion. (CP 191, 192-193). The second motion for summary judgment was not based on lack of publication. The certificate of those matters considered by the judge referred to the order approving the second motion for summary judgment.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Before discussion of the specific issues is made, reference is made to certain rules designed to insure 'that all controversies are decided on the merits, instead of on mere technicalities.

Rule on Appeal, RAP 1.2(a) provides:

> a. Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or non-compliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in Rule 18.8(b).

It was held by this court in *Beritich vs. Starlet Corp. (1966)*, 69 Wn.2d 454, 418 P.2d 762, that rules of pleading, practice, and procedure are to be drafted, adopted, and

interpreted to the end that the merits of a controversy are the ultimate determinants.

It does not seem that a decision based upon an incomplete record is consistent with the purpose of the rules on appeal, or consistent with a desire for justice. The appellate court should not have considered the issue of publication for the purpose of its decision.

A party in answering a motion for summary judgment has a right to rely on those specific issues raised in the motion. Anything else would be unfair and certainly would not allow the court to rule intelligently on the issues.

In *Williams vs. City of St. Louis,* 783 F.2d 114 (8th. Cir. 1986), the court held that it was error to enter summary judgment for a defendant on an issue not raised by defendant in its motion and not directly addressed by plaintiffs. That court further held that at a minimum the district court should have provided plaintiffs with notice regarding the consideration of this issue and a meaningful opportunity to address the issue.

In *Fairfield Scientific Corp. vs. U.S.* 611 F.2d 854 (1978), the court held that notice of a parties position in a motion for summary judgment must be given so that the opposing party has an adequate opportunity to respond. See *Russell vs. Atlas Van Lines, Inc.,* 411 F.Supp. 1111 (1976).

This is consistent with the requirements of fairness and due process. *US Const. Amend. V, WN. State Const. Art. 1 § 3.*

The trend of the courts has been to use the summary judgment device to clear their calendars. Summary judgment has been abused contrary to the rights of injured litigants. As this court has stated:

> "The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." *Balise vs. Underwood,* 62 Wn.2d 195, 381 P.2d 966 (1963).

The principles regarding summary judgment are set forth in a succinct fashion in *Balise vs. Underwood,* Supra, on pgs. 199 and 200.

Faith in the people is essential to democracy. That is why our state constitution provides that the right of trial by jury shall remain inviolate. *WN. State Const. Art. 1 § 21.*

Even if the issue of publication was before the court, a complete record would establish sufficient publication under any view of the evidence. Courts should never under the guise of summary judgment weigh the evidence. As stated by Justice Brennan in his dissent to *Anderson vs. Liberty Lobby, Inc.,* 54 L.W. 4755, 4762:

> "Moreover, if the judge on a motion for summary judgment really is to weigh the evidence, then in my opinion grave concerns are raised concerning the constitutional rights of civil litigants to a jury trial."

ISSUE 1 : May a court grant respondent affirmative relief from an order denying summary judgment where respondent did not timely file a notice of appeal or a notice for

discretionary review, but filed a notice of claim of error on appeal pursuant to RAP 2.5?

Under RAP 2.4(a) the rule is that the appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice for discretionary review, or (2) if demanded by the necessities of the case. Neither of these factual situations existed in this case, when the appellate court considered the issue of publication.

RAP 2.5 does not apply where there is a situation where the respondents are asking for affirmative relief from denial of summary judgment. In *Arthur vs. Social and Health Servs.*, 19 Wn.App. 542, 576 P.2d 921 on page 542 the court stated:

> "Aetna seeks affirmative relief from the denial of summary judgment on Simpsons claim for attorney fees incurred in defending the Utah lawsuit brought by Great Salt Lake. Having failed to file a cross-appeal, however, Aetna is in no position to claim error in this respect. RAP 2.4(a); *DeBlasio vs. Kittitas*, 57 Wn.2d 208, 356 P.2d 606 (1960); *Nord vs. Phipps*, 18 Wn.App. 262, 566 P.2d 1294 (1977).

ISSUE 2: If the court is going to consider an order denying summary judgment on the issue of publication of the defamatory matter without a cross-appeal can it do so without requiring certification by the trial court as to the matters considered in denying summary judgment on this question?

For the appellate court to consider the issue of publication, the court should have had the record identified with particularity by the judge who ruled on the motion for summary judgment on the issue of publication, and denied that motion.

As stated in *Millikan vs. Board of Directors,* 92 Wn.2d 213, 595 P.2d 533 (1979), on page 214 as follows, to wit:

> "The Court of Appeals applied the rule of *American Universal Ins. Co. vs. Ranson,* 59 Wn.2d 811, 370 P. 2d 867 (1962). There, at page 816, we explained the manner of and reason for specifying on appeal the matters considered in ruling on a motion for summary judgment:
>
> "First, they may be incorporated in a statement of facts certified by the trial courts; second they may be identified with particularity in the summary judgment signed by the trial court and then furnished to this court by transcripts certified by the clerk of the court. The reason is obvious: it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We must have before us the precise record - no more and no less - considered by the trial court."

This statement by the Supreme Court has now been adopted by the Supreme Court in RAP 9.12.

In this case the appellate court did not have all the matters before it regarding publication when it ruled regarding this issue in its opinion. This is unfair not only to the trial court, but to the appellants, and is unjust, and allows a decision to be made contrary to the merits of the case.

APPENDIX G

* * *

the certificate is there any reference to any depositions as being considered by the court in ruling on the motion on summary judgment where it granted summary judgment to the defendants on their second motion for summary judgment.

This court in its appeal applied the usual rules of summary judgment. It assumed for the purpose of the appeal that the LaMONS met their burden regarding a defamatory and false statement, found that the publication was unprivileged, but ruled against the LaMONS on an issue which was not rightfully before the court, to wit, publication.

At the oral argument, the attorney for the appellants pointed out to the court that there had not been a cross appeal by the defendants in this action, and that he did not feel that publication was an issue before the court. The attorney at that time indicated to the court that if they thought there was an issue on publication before the court that the records should be supplemented regarding this, and asked for the opportunity to address it in a supplemental brief.

4. Grounds for Relief and Argument.

The court should not have considered the issue of publication for the purposes of this decision. Under RAP 2.4(a) the rule is that the appellant court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the

respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice for discretionary review, or (2) if demanded by the necessities of the case.

RAP 2.5 does not apply where there is a situation where the respondents are asking for affirmative relief from denial of summary judgment. In *Arthur vs. Social and Health Servs.*, 19 Wn.App. 542, 576 P.2d 921 on page 542 the court stated:

> "Aetna seeks affirmative relief from the denial of summary judgment on Simpsons claim for attorney fees incurred in defending the Utah lawsuit brought by Great Salt Lake. Having failed to file a cross-appeal, however, Aetna is in no position to claim error in this respect. RAP 2.4(a); *DeBlasio vs. Kittitas*, 57 Wn.2d 208, 356 P.2d 606 (1960); *Nord vs. Phipps*, 18 Wn.App. 262, 566 P.2d 1294 (1977).

Furthermore, if the court was going to consider the denial of the first motion for summary judgment regarding publication brought by the defendants, then the court would have had to have the record identified with particularity by the judge who ruled on that motion. As stated in *Millikan vs. Board of Directors*, 92 Wn.2d 213, 595 P.2d 533 (1979), on page 214 as follows, to wit:

> "The Court of Appeals applied the rule of *American Universal Ins. Co. vs. Ranson*, 59 Wn.2d 811, 370 P.2d 867 (1962). There, at page 816, we explained the manner of and reason for specifying on appeal the matters considered in ruling on a motion for summary judgment:
>
> > "First, they maybe incorporated in a statement of facts certified by the trial courts; second they may be identified with

> particularity in the summary judgment signed by the trial court and then furnished to this court by transcripts certified by the clerk of the court. The reason is obvious: it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We must have before us the precise record - no more and no less - considered by the trial court."

In this case the court did not have all the matters before it regarding publication when it ruled regarding this issue in its opinion. This is unfair not only to the trial court, but to the appellants.

* * *

(f) of that rule states that all pleadings shall be so construed as to do substantial justice.

The purpose of this rule and its coordinate rules is to permit the merits of the case to be reached no matter how inept counsel may have been in the pleading stages of the controversy. The change in terminology emphasizes the fact that it is no longer necessary to state a "cause of action"; it is sufficient to make a short "statement of the claim showing the pleader is entitled to relief." *Original Ballet Russe vs. Ballet Theater,* (CCA.2d 1943) 133 Fed.2d 187, 189.

In conclusion, it is believed the court wrongfully considered the issue of publication in this appeal. Furthermore, if the court was going to consider the issue of publication, it should have had a proper record before it for this consideration. Finally, it is not necessary in Washington pleading to assert causes of action.

Since the husband and wife are separate legal entities, they are each parties when they assert separate causes of action no matter how inartfully done, and they are each entitled to

* * *

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EDWARD LAMON and LORRAINE LAMON, husband and wife, Plaintiffs, vs. LOUIS PETERSON AND JANE DOE PETERSON, husband and wife; and JOHN REGAN AND JANE DOE REGAN, husband and wife, Defendants.	NO. C74-98T FINDINGS OF FACT (Filed Oct. 13, 1978)

This matter having come on for trial before the above-entitled court on August 31, 1978 and continuing through September 1, 1978, the Plaintiffs appearing personally and with their attorney, Jack L. Burtch, the Defendants, John Regan and Mabel Regan, appearing personally and with their attorney, Stanley J. Krause, and the Defendant, Louis Peterson, having been dismissed from the case on motion of Plaintiffs, and the court having heard testimony and having considered the evidence, including exhibits filed herein, and deeming itself fully advised, makes the following:

FINDINGS OF FACT

I.

Plaintiffs, at all material times herein, were and now are husband and wife, resided in Westport, Washington

have been taxpayers and citizens of Westport, Washington, and have operated a restaurant business known as The Ocean Queen Drive-In, within the corporate limits of said town, now City of Westport, owning said business and the land on which said and have resided in Westport, Washington. That Westport, at all times since May 8, 1968, has been a municipal corporation of the State of Washington, and the said John Regan has been Town Marshal or Chief of Police in charge of the police department for said municipal corporation. That John Regan's employment with Westport as such Chief of Police or Town Marshal was on behalf of and of benefit to his marital community.

III.

That from 1969 to March 1, 1976, when new owners took possession of The Ocean Queen Drive-In, the Defendant, John Regan, as Town Marshal or Chief of Police of Westport, Washington, willfully refused to give proper police protection to the Plaintiffs and their business property and did not give the same police protection to the Plaintiffs that he saw as Chief of Police was provided to other citizens of Westport.

IV.

That the said John Regan, as Chief of Police of Westport, Washington, by direct order and by his actions and encouragement, willfully and intentionally caused the Plaintiffs to be deprived of the same police protection as other citizens of Westport, and particularly caused the Plaintiffs' business to be deprived of adequate and equal

security checks to protect the business against vandalism and theft.

V.

That the said John Regan, as Chief of Police of Westport intentionally and deliberately misused his position and office to discriminate against the Plaintiffs in regard to police protection.

VI.

That a direct result of said discrimination Plaintiffs became extremely worried about their business investment, suffered headaches, nervous exhaustion, and lack of sleep, and were humiliated and embarrassed. That they further found it necessary to stay long hours at their place of business after closing time to protect their business investment from vandalism and theft, all of which was detrimental to their physical and mental health. That the strain on Plaintiffs became so unbearable that they were forced to sell their business, including the improvements and land, in February of 1976.

VII.

That in addition to attorney fees incurred in preparation of the trial of this action, the Plaintiffs also incurred attorney fees and costs to appeal the dismissal of this action to the Court of Appeals, Ninth Circuit.

From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

I.

Jurisdiction is vested in this court by virtue of the Civil Rights Act of 1871, 17 Stat. 13, as codified in Title 42, U.S. Code, Chapter 21, Section 1983, and the court has jurisdiction over the subject matter of this action and over the Parties.

II.

That the conduct of said Defendant, John Regan, was willfull and wanton and deprived Plaintiffs of their right to equal protection of the law under the United States Constitution. That the Defendant was acting under color of state law.

III.

The Plaintiffs are entitled to judgment against John Regan and his marital community composed of John Regan and Mable Regan, his wife, in the amount of $15,000.00 for compensatory damages, and the sum of $10,000.00 for punitive damages for a total judgment of $25,000.00, and $2,500.00 as attorneys fees, together with their costs disbursed herein.

Dated this 13th day of October, 1978.

/s/ Jack E. Tanner
United States District Judge

APPENDIX I

In 1974 the former owners of the Ocean Queen Drive Inn were involved in an assault incident concerning the owner of the drive inn striking a Daily World reporter with a "deadly weapon", i.e.: a hamburger.

At the time of the incident, Police Chief John Regan was off duty.

The drive inn owners subsequently filed suit against Police Chief Regan, claiming Lack of Equal Police Protection Under the Law.

The end result of this suit is that the Regan's personal property, their home and miscelaineous financial assets are in dire jeopardy because the City of Westport is claiming lack of funds to provide liability insurance for their city employees. The City of Westport should provide a supersedeas bond to preclude the sale of the Regan's property. The responsibility of the City of Westport is to provide adequate liability insurance to cover such incidents involving their City employees.

We, the undersigned, believe the City of Westport has the responsibility to support Police Chief, John Regan in his legal dispute with the individuals who are trying to confiscate his personal property. In the past the City has accepted responsibility for legal bills pertaining to this suit. Therefore, we feel they are liable to continue this support and post the Appeal Bond to avoid the Regan's undue financial hardship and confiscation of their personal property.

On Monday night, September 24, 1979, at 7:00 PM, the City Council will convene to make some sort of a decision, either for or against the Regans.

Your presence at this meeting will give moral support to John and Mabel Regan and most definately influence the Council towards a more favorable decision.

NAME	ADDRESS	PHONE NUMBER
Lynn Trotter	Westport	268-0743
Neddie R. Farrington	Westport	268-1666
Audrey Jackson	Westport	268-0640
Ralph E. Jackson	Westport	268-0640
John T. Olson	Westport	268-1666
Charlotte Williams	Westport	268-7411
Lloyd Sehllach	Westport	268-7031
Ann Barney	Westport	268-4681
Jerry Capeau	Westport	268-5690
Pete W. Eicluhegn	Westport	
Jacqueline D. Goodrich	Westport	268-0781
Joyce O. Kuzmak	532-4178	in Westport
	Rt. 11 Box 169 Aberdeen	Property owner
David T. Roberts	Westport	268-0784
Ron Discher	Westport, WA	268-0670
Rudy Amers	Westport	268-6694
Susi Foster	Westport	268-0406
Chuck Sturtz	Westport	268-1515
Ann Hall	Westport	268-1515

APPENDIX J

* * *

Page two, Council meeting September 24, 1979.

in the council chambers to review the plan.

Mr. Osborn, Engineer for Moore Wallace and Kennedy reported on the UAB project. The contractors have begun and so far are on schedule. South Ocosta Street should be improved so it may be used as an additional detour. Orville Engle moved that this be improved, seconded by Gary Pedersen, motion carried. This will be a twent foot width and approx 100 feet long. Gary Pedersen requested that Mr. Osborn give a cost estimate on the street returns which are not at the present time opened and should have returns placed for future use.

Mr. Regan reported on a portable radio which was destroyed. The cost for the radio will be $646.00 and our insurance only covers $140.00. This will be checked into and corrected.

Mr. Regan and Harold Walters will get together with the Public Safety Committee and discuss the possibility of removing the phones from the Firemens home now that they are on the Plectron system.

Communications

Letter from the Employment Security Department informing the city they were removing the trailer which they used for Unemployment claims from the City parking lot. Mr. Quillinan was in the audience and explained the situation.

Letter from Department of Emergencies Service Program requesting $500.00 for the budget for 1980

Letter from Department of Revenue informing the City of additional monies due from the Stadium tax.

Letter from John M. Wolfe requesting space in the Old Coast Guard Building. This will be looked into when we find out from the auditor as to cost. There office spaces available on the second floor.

Pat Dugan from Regional planning presented a contract to the city in connection with the City and Grays Harbor Regional planning for reimbursed planning activities. Mr. Dugan introduced Mr. Dan Di Guilio who will be working with the Planning Commission to up grade our zoning ordinance. Contract was turned over to the atty for study. Frank Schnider moved to authorize the mayor to sign contract after approval from the Atty., seconded by Gleyn Bledsoe, motion carried.

Open to Public

Lynn Trotter presented council with a petition signed by residents of the City of Westport supporting John Regan in his suit with the LaMons'. This petition request the City to back Chief Regan with the financial responsibility for legal bills and the bond.

Ed Mc Fate asked about the parking committee's report for the

* * *

been looking it over and at this time had no comment to make. When it comes up before council for further discussion the Parking Committee will be notified.

There have to have estimates made on costs for paving and so forth, The Mayor thanked the committee as a whole and felt a good job had been done.

Bills

Gleyn Bledsoe moved to approve warrants nos 3005 through 3054 for the amount of $49,640.44, seconded by Orville Engle, motion carried.

Gary Pedersen called for an executive session to discuss personnel.

Meeting resumed at 9:45 P.M.

Letter from Mrs. Coley which was overlooked under communications was read. This was in regards to loading zones in front of her place. Letter was turned over to the Street Committee to take up when they review the parking problems.

Orville Engle moved that the city pay the cost of the bond and any interest which may arise, with Mr. Regan putting up the principal, Gleyn Bledsoe, seconded. After much discussion and other recommendations discussed, question was called and motion carried.

Several comments were made from the floor in Mr. Regan's behalf.

Gleyn Bledsoe moved that copies of the documents which pertain to the Regan-LaMon case be placed in the Library for any interested parties to read. Seconded by Orville Engle, motion carried.

The Clerk will contact Mr. Regan and Mr. LaMon if they have any documents they wish to have placed there.

Orville Engle reported on the progress of the Convention Center, BJSS are getting the plans ready for bid.

Gleyn Bledsoe moved that the meeting be adjorned, seconded by Cheryl Ahern, motion carried.

Meeting adjorned at 10:30 P.M.

Respectfully submitted,

/s/ Marilyn J. Krein
Clerk-Treasurer

APPENDIX K

IN THE SUPERIOR COURT OF WASHINGTON
STATE FOR GRAYS HARBOR COUNTY

EDWARD LaMON and LORRAINE LaMON, husband and wife, Plaintiffs, -vs- CITY OF WESTPORT, et al, et ux, Defendants.	)	NO. 73736 AFFIDAVIT OF MARILYN KREIN

STATE OF WASHINGTON]
:SS.
GRAYS HARBOR COUNTY]

MARILY KREIN, being first duly sworn upon her oath, deposes and says:

That on September 24 and 25, 1979, your affiant was the duly appointed and acting City Clerk/Treasurer for the City of Westport, Washington. That on September 25, 1979 your affiant, pursuant to directions from the Mayor of the City of Westport and Westport City Council, placed the attached documents, numbered page 1-505, in the City of Westport Public Library.

/s/ Marilyn Krein
MARILYN KREIN

SUBSCRIBED AND SWORN to before me November 23, 1981.

/s/ illegible
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, Residing at Aberdeen

APPENDIX L

Where the World's Best Fishermen Fish

City of Westport
Westport, Washington 96595
Telephone 268-4595

Bill Wade
Mayor

Marilyn Krein
Clerk-Treasurer

October 15, 1979

Mr. Ed LaMon
Westport, WA 98595

RE: LaMon vs. Regan

Dear Mr. LaMon:

At the September 26, 1979 council meeting Council requested me to ask you for any information your may want to contribute to the File of LaMon vs. Regan. I have asked Mr. Regan for his contributions. These will be copied and placed in the Library for the public to go over to enable them to understand the case.

Sincerely,

/s/ Marilyn J. Krein
Clerk-Treasurer

APPENDIX M

STANLEY J. KRAUSE
Attorney at Law
403 Becker Building
Aberdeen, Washington 98520

Telephone (208) 532-3141

April 27, 1978

Mr. John Regan, Chief
Westport Police Department
P.O. Box 505
Westport, Washington 98595

Re: Edward LaMon et al.
Vs. John Regan et al.

Dear Mr. Regan:

I had a long discussion with Dan Crisp yesterday afternoon concerning the background of the LaMons and their relationship with law enforcement officers over a period of years. From this and other background material I am of the opinion that one approach to your defense will be to show the difficulty created by the LaMons in their relationship with law enforcement officers and the difficulty faced by you as the Chief of Police.

The opinion by the United States Court of Appeals focuses upon the basis of the LaMon claim when it said: "Appellants' allegation that the appellee intentionally and deliberately misused his position to discriminate against them is sufficient for purposes of the Equal Protection Clause of the Fourteenth Amendment". In discussing the facts the court referred to the affidavit of Celia Abrogast and the deposition of Jesse Mack.

I believe you have a copy of Abrogast affidavit. She stated that by constant derogatory comments about the LaMons you encouraged those working for the police department not to allow the LaMons the same protection as to other citizens in the community. She deliberately avoided going into LaMons' restaurant. You frequently made comments that Mr. & Mrs. LaMon didn't need your protection. She referred to the shrub incident and claimed you made a statement that the LaMons called the County Sheriff so let them take care of it. She referred to comments in the log which were derogatory to the LaMons. She personally observed the lack of patrolling by patrol cars so that the LaMons didn't receive the same amount of police protection as other restaurant owners in the community. She stated that she heard you say that it was not necessary to check the Odean Queen Drive-In if the light was on in the back room and it looked like someone was there.

Crisp, Bradshaw and Hukill all stated that the LaMons worked in the restaurant after closing until the early hours of the morning and could be plainly identified as they drove by. Due to LaMons' habits and easy observation of their presence, I assume the same check would have to be made as in the case of many other establishments.

I am sure we can obtain a number of witnesses who will testify that the LaMons are notorious concerning their political activities and their active participation in attacking the reputation of law enforcement officers. I am sure you received complete information concerning this shortly after you arrived in Westport. I will discuss this notoriety later in this letter in going over some of the

testimony. I will handle the Abrogast testimony by showing her bias because of her discharge from the Westport Police Department and the investigation concerning her 12 year old daughter working at LaMons. There is a possibility that Jesse Mack and you discussed the LaMons soon after he was employed in July 1970. He probably is not entirely accurate concerning his reconstruction of the conversation when he testified as follows:

"A Well, it is hard to put into words. When I first went to work there Mr. Regan pointed him out as being a police – or indicating that he didn't like police and just stay away from him"

He also testified:

"A Well, most places you make a habit of running through the parking lots and stuff at night and I never used to go through their parking lot at all or check their business."

"A The restaurant that Mr. LaMons owned, and that Mr. LaMon or the LaMonses hated the police department and the best thing to do was just stay away from them and let them take care of themselves."

"A Yes sir. I would say the first two years I was with the department I don't think that I afforded them the same police protection that I afforded everyone else due to the statement that Mr. Regan made."

I believe that a statement by you that the LaMons don't like the police and the officers should be careful and that, unless necessary to do otherwise, they should be avoided. With Mack's present experience I believe that he will admit that a warning by you concerning the

LaMons would be a proper procedure. I believe that he will also admit that from statements made by you he was not justified in affording them less police protection than others. I hope that we can go over this matter with Mack and take any sting out of his testimony.

I will not review the background and reason for caution on your part in your relationship with LaMons and the danger in actually confronting him in connection with police activities.

We can get a number of witnesses who will testify concerning LaMons' political activities and his attendance at council meetings attacking governmental personnel and recording all activities. I am sure everyone knew of their activities in connection with the recall of Byron Cramer. I am enclosing a part of the opinion of the Supreme Court in connection with the recall. In addition, Dan Crisp stated that LaMons brought suit against him in which it was alleged that Crisp conspired to get LaMon wrongfully arrested. The Cramer and Crisp litigation showed you as Chief of Police that there was a danger of being sued in connection with any claimed misstep on your part. You and your department had to be careful in dealing with LaMon. In addition, you had difficulties with LaMon which focused your attention upon the necessity of staying away from him.

You and I discussed the attack made on you in connection with the Tony McLendon prosecution.

Ralph Boohm stated that LaMon complained to him about the police department and other law enforcement personnel as follows:

1. Complaints about Dan Crips.

2. Periodical complaints at council meetings.

3. Periodical long and loud complaints at council meetings concerning law enforcement.

4. Complaints concerning Tony McLendon.

5. Complaints concerning Everett Roman.

6. Complaints about Leroy Winkler.

7. Complaints about John Regan.

   (a) High speed escort of ambulance.

   (b) Leaving patrol cars running.

   (c) Trying to take over fire department activities.

   (d) Excessive drinking.

   (e) Forbidding patrol men to stop at restaurant.

In May 1970 LaMon told Boohm he would recall him if Boohm didn't fire you and that you had a police department which was larger than Westport could afford.

Crisp told me that many people in Westport thought that the LaMons were Communists because of their constant attack on law enforcement officers. I do not believe that Crisp actually thinks that they are Communists but he feels that they have a strange fixation resulting in a consistant attack on individuals regardless of time or costs.

This letter is somewhat detailed in order to clarify some of the approaches to the case with the possibility

that we can build additional testimony along the lines indicated.

Very truly yours,

/s/ Stanley J. Krause
STANLEY J. KRAUSE

SJK/vb

Comments Of Chief Regan To Plaintiffs' Answers To Interrogatories – Federal Case

#16 (b) same answer as (a)

(c) same answer as (a)

(d) Edward and Pat Peek, (a Westport patrolman and personal friend of Arbogast) was at the Arbogast residence when patrolman Bradshaw went to the residence on 19 April. Fred Bradshaw was the patrolman on duty, and Roseyln Leahy, (another personal friend of Arbogast) was the dispatcher on duty at that time. Bill Wade was and is the Major of Westport, and Mrs. Arbogast called him immediately after the patrolman's visit to complain of the alleged "harrassment".

(c) (attached sheet) Refer to statements of Bradshaw, Leahy, and other information provided. Also the words "ordered", "demand", "harrassment", in the explaination of the incident are evidently the adjectives added by the plaintiffs, and are false in describing the incident as it actually happened.

#17 (a) All of the persons mentioned as witnesses to the alleged defamation have been explained previously except Jan Rodman Irwin, at one time employed by the department. When it became necessary to reprimand Mrs. Rodman (at that time) concerning certain problems with excessive absenteeism and conduct she became angry and resigned without notice.

(b) The Chief has heard that LaMon had communistic ideas and was a troublemaker but the referral made in the answer was not made by the Chief. The only incident known about alleged food poisening was a woman, Mrs. Cecelia REPP, who came to the department (see attached)

(c) N/A

(d) It is not difficult to determine why Arbogast, Mack, Bennett, and Spain, (a close personal friend of the LaMons) would testify to this, due to the background concerning each. As to the testimony of the readers of the Aberdeen Daily World, it would be rather ridiculious to assume that the newspaper would have, in print, under Chief Regans direction referred to the Ocean Queen, as a Ptomaine Palace, Ed LaMon as a communist and conspirator and troublemaker. It would be interesting to obtain these alleged newspaper articles.

#18 same answer as #17. The Chief is not aware of any loss of good name and reputation, as it is alleged that the huge mass of persons mentioned are.

#19 N/A

#20 Westport, a tourist community for approximately six months of each year, has off years. It would be interesting to note other Westport restaurants comparisons for the same period of time. It is believed that it would be found that 1972 will not go down in history as one of Westport's most profitable seasons.

INTERROGATORY NO. 17.

As to plaintiffs' allegation that defendant Regan defamed plaintiffs, set forth the following as to each act of defamation.

(a) To whom the defendant Regan defamed plaintiffs with such persons address.

ANSWER: Jesse Mack
Joanne McKinney
Boyce Bennett
Cathy Arbogast
Rose Leahy
Ed Peak
Jan Rodman Irwin

(b) Exactly what was said by each party in connection with such defamation.

ANSWER: Referred to the Ocean Queen Drive In as Ptomaine Palace. Referred to Ed LaMon as a communist and "a conspirator", "a trouble maker" and falsely stated that

unacertained members of the public got food poisoning in their restaurant.

X Who I the chief have heard that LaMon had communistic ideas and was a trouble maker but the referral made in the answer was not made by the chief. Mr. & Mrs. LaMon were telephoned and advised that a woman had claimed she was poisoned by there food she thought so.

(c) The time and place of each defamation.

ANSWER: Dates and places of defamations not available at the present time.

Daily World News Release

Westport council considers defense for Regan

By BETTY BUTLER
World Staff Writer

WESTPORT – The major item of a short town council meeting last night was discussion between the four councilpersons present with Westport Police Chief John Regan as to whether the town will furnish Regan legal counsel to defend himself against a suit brought by Mr. and Mrs. Ed LaMon, Westport.

LaMon was at the meeting, taping the proceedings on a tape recorder.

The LaMons are suing Regan for alleged false arrest of Mrs. LaMon in connection with an assault complaint filed by John Lewis Peterson, Seattle, in July, 1972. Mrs. LaMon was later found guilty of the charge in Westport Municipal Court.

The town's insurance policy against false arrest had lapsed on that date and new insurance had not taken effect, so defending Regan against the charge and other charges of malfeasance brought by the LaMons will not be financed by insurance. The town is now fully covered, Clerk Ellen Western assured the council.

"We'd better find out the extent of this case and our liability before we take action," councilman Milt Oestreich, acting as mayor in the absence of Bill Wade, cautioned. Accordingly, although the council acknowledged that the town has a responsibility to defend the chief, they decided to consult with town attorney William Morgan, who was not at the meeting, and with other attorneys before taking action.

Morgan is slated to be a witness in the case, and therefore cannot participate as counsel, Regan explained.

The council discovered that its zoning classification of part of the Grand Army Addition to prevent the installation of mobile homes cannot be reconsidered until after a year. The zoning decision had brought about numerous complaints from property owners.

On motion of Jim Watkins, Harold Hardy, town engineer, was appointed to attend Grays Harbor Regional Planning Commission meetings in the absence of Mayor Wade.

The town will seek cooperation of the Port of Grays Harbor in the problem of policing the Port-owned floats and other property, and in installing uniform stop-signs at several locations, some controlled by the Port, the council decided after discussion.

The councilpersons signed a letter from Hardy to the Regional Planning Commission asking its support of adjusting Shorelines Management Act jurisdictional lines drawn by the State Department of Ecology, which he said make Westport "the only town that now is a ward of the state."

The council noted, and will consider action on, a letter from the planning commission asking for input regarding the proposed Satsop nuclear power plant, and a letter from the Rural, Development Committee reporting that it had turned thumbs down on the proposed plant.

It also approved an assessment of $976 as its share of the planning commission's operating expenses during 1975.

Confidential Police Report

SOUTH BEACH AMBULANCE SERVICE
CALL **268-1971** AMBULANCE No. 56

Name:
Mrs. Ben (Cecelia) REPP

Home Address:
Rt. #1, Selah, Wash.

Mileage in:
3055

From:
Westport, Wn. City Hall

Mileage out:
3011

To:
St. Joseph'a Hospt.
Aberdeen, Wn.

Total Mileage:
44

Called by:
Mrs. BARNWELL

Time: **AM**
0010 A

Driver: Attendant:	**Time Out:**	**Time In:**	**Date:**
J. BREITSPRECHIR/ M. REGAN	0015	0147	6-20-73

Illness or Injury:
Food Poisoning

Base Fee:
$30.00

To Whom Billed:
Same as Above

Mileage:
$22.00

****

Extra Charges
Oxygen $3.00

Occupation:
Retired

Total:
$55.00

Chge.
X

APPENDIX N

IN THE SUPERIOR COURT OF WASHINGTON
FOR GRAYS HARBOR COUNTY

EDWARD LaMON and LORRAINE LaMON, husband and wife, Plaintiffs, vs. CITY OF WESTPORT, a Municipal Corporation, BILL WADE, JR., and JANE DOE WADE, his wife, ORVILLE ENGLE and JANE DOE ENGLE, his wife, FRANK SCHNIDER and JANE DOE SCHNIDER, his wife, GARY PEDERSEN and JANE DOE PEDERSEN, his wife, CHERYL AHERN and JOHN DOE AHERN, her husband, GLEYN BLEDSOE and JANE DOE BLEDSOE, his wife, and JOHN J. REGAN and MABLE REGAN, his wife, Defendants.	NO. COMPLAINT

COMES NOW EDWARD LaMON and LORRAINE LaMON, husband and wife, and for a cause of action against the Defendants, complain and allege as follows:

I.

Plaintiffs reside in the City of Westport, Grays Harbor County, State of Washington, are husband and wife, and as such constitute a marital community under the laws of the State of Washington.

II.

That the Defendant, CITY OF WESTPORT, is a municipal corporation of the State of Washington.

III.

That JOHN REGAN and MABEL REGAN were husband and wife, residing in Westport, Washington, and the acts of JOHN REGAN were the acts of his marital community.

IV.

That the other defendants were members of the city council of the City of Westport, Washington, or were the spouses of said members of the said city council, and all action done by the members of the city council was done on behalf of their marital communities. That all said parties reside in the City of Westport, Grays Harbor County, State of Washington.

V.

That within the period of the Statute of Limitations the said city acting by its city council, the members of the city council, and JOHN REGAN as Chief of Police of the City of Westport, caused to be published in the city library of the City of Westport, Washington, material, some of its relating to an action brought by the plaintiffs against JOHN REGAN, Chief of the Police of the City of Westport and against his marital community, and much of which material was not of public record and could have no legitimate public purpose.

VI.

That the matter so published of and concerning the plaintiffs was false and defamatory and was an invasion of their privacy.

VII.

That by reason of the defamatory material and the invasion of the privacy of the said plaintiffs they have been exposed to hatred, contempt, ridicule, obloquy, and they have been deprived of the benefit of public confidence and social intercourse. That said defamation and invasion of their privacy has caused them great humiliation, chagrin, emotional distress and mental suffering and has caused injury to their reputation, characters, and suffering and has caused injury to their reputation, character, and feelings.

WHEREFORE Plaintiffs pray for judgment against the said Defendants and each of them and against their marital community in the amount of not less than $250,000.00 or a greater amount as may be proven at the trial of this action.

JACK L. BURTCH
Attorney for Plaintiffs

STATE OF WASHINGTON)
) ss:
GRAYS HARBOR COUNTY)

EDWARD LaMON, being first duly sworn, deposes and says:

That he is one of the Plaintiffs above named, that he has read the foregoing claim for damages, knows the contents thereof, and knows the same to be true.

/s/ Edward LaMon
EDWARD LaMON

SUBSCRIBED AND SWORN to before me this 2nd day of July, 1980.

NOTARY PUBLIC in and for the
State of Washington, residing
in Aberdeen.

APPENDIX O

IN THE SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

EDWARD LaMON and LORRAINE LaMON, husband and wife, Plaintiffs,	NO. 73736
vs.	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
CITY OF WESTPORT, a municipal corporation; BILL WADE, JR., and JANE DOE WADE, his wife; ORVILLE ENGLE and JANE DOE ENGLE, his wife; FRANK SCHNIDER and JANE DOE SCHNIDER, his wife; GARY PEDERSON and JANE DOE PEDERSEN his wife; CHERYL AHERN and JOHN DOE AHERN, her husband; GLEYN BLEDSOE and JANE DOE BLEDSOE, his wife; and JOHN J. REGAN and MABEL REGAN, his wife, Defendants.	

COMES NOW the above-named defendants by and through their undersigned attorneys of record and hereby moves the Court as follows:

For an order of summary judgment dismissing plaintiffs' complaint for defamation and for invasion of privacy on the ground that the designated file materials will

not, as a matter of law, support an action for defamation and/or invasion of privacy.

This motion is based upon the records and files herein and memoranda of counsel submitted herewith.

DATED this ___ day of November, 1983.

AIKEN, ST. LOUIS & SILJEG

Steven Soha
Attorneys for Defendants

APPENDIX P

SUPERIOR COURT OF THE STATE OF WASHINGTON
GRAYS HARBOR COUNTY

JOHN H. KIRKWOOD
JUDGE DEPT. 1 - 249-5140

COURT HOUSE
MONTESANO, WA 98563

JOHN W. SCHUMACHER
JUDGE DEPT. 2 - 249-3812

December 20, 1983

Mr. Jack L. Burtch
Attorney at Law
P.O. Box A
Aberdeen, Washington 98520

Aiken, St. Louis and Siljeg
Attorneys at Law
1215 Norton Building
Seattle, Washington 98104

Re: LaMON v. WESTPORT, Grays Harbor County Cause No. 73736

Gentlemen:

Defendants' second motion for summary judgment is granted.

Very truly yours,

/s/ John H. Kirkwood
John H. Kirkwood, Judge

JHK:ml
cc: File

APPENDIX Q

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRAYS HARBOR

EDWARD LaMON and LORRAINE LaMON, husband and wife, Plaintiffs, CITY OF WESTPORT, et al, Defendants.	NO. 7 3 7 3 6 CERTIFICATE

THE UNDERSIGNED JUDGE, before whom the proceedings herein were held, hereby certifies that the following clerk's papers, depositions, and exhibits are the precise matters considered in ruling on the motion for summary judgment and entry of the order of summary judgment, which was entered on January 9, 1984.

(1) Complaint filed July 3, 1980.

(2) Affidavit of Prejudice signed by Edward LaMon against the Honorable Judge John Schumacher filed July 29, 1980.

(3) Answer of Defendants filed September 24, 1931.

(4) Affidavit of Bertha E. Wilcox dated November 20, 1981.

(5) Affidavit of Marilyn Krein, dated November 23, 1981.

(6) Response to Request for Production of Documents filed March 9, 1982.

(7) Response to Request for Admission of Facts filed March 9, 1982.

(8) Exhibits "B" also Exhibits 1 through 505.

(9) Defendants' First Interrogatory to Plaintiffs and Answers thereto filed March 9, 1982.

(10) Affidavit of Lorraine LaMon filed October 10, 1983 together with all attachments.

(11) Affidavit of Lorraine LaMon and Motion for Change of Judge and Affidavit of Prejudice against the Honorable John H. Kirkwood filed October 10, 1983.

(12) Memorandum regarding amendment filed October 28, 1983.

(13) Defendants' Memorandum in Support of Motion for Summary Judgment filed November 14, 1983.

(14) Defendants' Motion for Summary Judgment filed November 14, 1983.

(15) Affidavit of John Regan filed November 14, 1983, with attachments.

(16) Memorandum Regarding defense Motion for Summary Judgment and Motion in Liminie filed November 21, 1983.

(17) Clerk's Minutes of November 21, 1983.

(18) Judge's Letter of November 30, 1983 filed December 20, 1983.

(19) Judge's Decision of December 20, 1983 granting Defendants' Second Motion for Summary Judgment.

(20) Affidavit of Lorraine LaMon filed December 22, 1983.

(21) Affidavit of Edward G. LaMon filed December 22, 1983.

(21) Motion to Reconsider Decision of December 20, 1983 Granting Defendants' Second Motion for Summary Judgment with attachments filed December 22, 1983.

(22) Notice of Hearing on Motion for Reconsideration filed December 22, 1983.

(23) Defendants' Statement in Opposition to Plaintiffs' Motion for Reconsideration filed December 27, 1983.

(24) Order Denying Plaintiffs' Motion for Reconsideration dated January 9, 1984.

(25) Order Granting Summary Judgment dated January 9, 1984.

(26) Clerk's Minutes of January 9, 1984.

(27) Order of January 9, 1984 in writing filed January 9, 1984.

(28) Notice of Appeal to Court of Appeals filed January 24, 1984.

Dated: 4/30/84

/s/ John H. Kirkwood
JUDGE

Presented by:

/s/
JACK L. BURTCH
Attorney for Plaintiffs

APPENDIX R

* * *

(p.4) Q What would you look in the phone book to find her phone number?

A Under Bradley and Lisa Powell.

Q Bradley and Lisa Powell. And that's in Seattle?

A In Seattle.

Q Mrs. Matteson, did you attend a Westport City Council meeting of September 24, 1979?

A I wouldn't be able to remember it.

Q This was a meeting in which a petition was filed and I think Mr. Trotter introduced the petition to the council regarding whether or not the city council would put up a bond for Mr. Regan's appeal of a civil rights judgment against him in the Federal Court. Do you remember anything about that?

A No.

Q Did you learn sometime in 1979 that material involving that particular lawsuit was going to be put in the Westport public library?

A I don't know about the dates but, yes, I learned it.

Q How did you find that out?

A I read it in the Aberdeen –

A –Daily World.

Q –Daily World?

A Right.

* * *

APPENDIX S

* * *

(p.13) A No.

Q Did you see them taken out

A They came in and asked for them. They were never out. They were under the desk, the checkout desk.

Q Were you present when somebody came in and asked for the materials to remove it from the library?

A Yes. They came in and asked for them. We took it out from under the desk and handed it to them. I knew it was someone from the City, but I don't remember which individual it was.

Q Did you tell Mr. Fuller that you had seen a man look at the material on one occasion?

A I was asked if I remembered anyone looking at them, and I said I remembered the LaMons coming in and looking at them.

Q Did you also say you remembered a man looking at them?

A Yes. There was one man that came in and looked at them, or two men that came in. And one man asked for them, but he never took them out of my hands.

Q Did he look at the material?

A The one man did.

Q The one man went through the material?

A He stood there and pulled the pages back and looked for a few minutes or a minute – I don't – a very short time.

Q You don't know how much of the material he looked at?

(p.14) A No.

Q Or what he saw in the material?

A No.

Q But he definitely looked at the material?

A He ruffled the papers or flipped them back, yes.

Q And this was his request, he asked to look at the material?

A Yes.

Q So there were two men that you remember yourself that asked to look at the material?

A Yes.

Q And you say that one of them did not?

A No. When I brought it out from under the desk, he said, "Is that it?"

And I said, "Yes, this is it."

And he said, "Oh, forget it. I'm too busy," or something like that and walked out.

Q Now, the other man, did you place the material and give it to him?

A I handed it to him. He stood in front of me, and he kind of – I don't know what the term would be –

ruffled, flipped through, and handed it back to me and left.

Q But he definitely looked at the material in there but you don't know how much of it he looked at or what he saw?

* * *

APPENDIX T

* * *

(p.4) council they asked if I would provide those documents to the City, which I did.

Q You were requested at open council meeting by City of Westport City Council to provide the documents to the City?

A That's correct.

Q And was that the meeting of September 24, 1979?

A I can't say.

Q Was it just prior to entering this material in the library?

A It was a council meeting prior, yes.

Q Do you know – Did the material that was placed in the library that's Exhibit 1 through 505; page 505, was that material that was in your possession?

A That's correct.

Q Was that kept at the City of Westport police station?

A No, sir. In my home.

Q All of this material was kept in your home?

A Yes, sir, it's still there.

Q You kept your originals and made copies for the purpose of putting them in the library?

A No, sir.

Q Who made the copies?

A That I don't know.

Q You gave all of your documents to the City of Westport,(p.5) and they returned your documents?

A Yes.

Q So the City of Westport made copies, is that correct?

A I can't answer that. I assume they did.

Q All you're saying is that copies were made after you delivered your documents to the City of Westport?

A That's correct.

Q Now, this request for this material to be put in the city library was a formal resolution adopted by the city council at an open council meeting; is that correct?

A Yes, sir.

Q Were you requested or were you directed to put this material in the library?

A I was not directed to place it anyplace. I was asked if I would relinquish those papers to the city so they could have them.

Q So you yourself played no part in putting it in the library?

A No, sir.

Q What you did was at the request of the city deliver all this material to someone in the city government; is that correct?

A That's correct.

Q Who was that someone?

(p.6) A The City Clerk.

Q Did you, when you delivered that material, realize it was going to be placed in the city library?

A I didn't have any idea what they were going to do with it at the time.

Q Didn't they, in the city council meeting indicate that they were going to put it in the city library?

A They did mention that.

Q So when you delivered it to the city, you were aware of the resolution by the council that they were going to put this material into the city library; is that correct?

A I remember something being said about it.

Q You were present at the meeting where this took place, were you not?

A That's correct.

Q Is it not true that Councilman Gleyn Bledsoe made the motion to place the material in the library?

A As I recall, yes.

Q And this motion passed unanimously?

A I don't know what – I can't recall what council said or what they did after that.

Q Did you yourself make the statement at the time "be good winter reading?"

A I don't believe so.

Q Prior to this resolution or motion by the city council

* * *

APPENDIX U

* * *

(p.7) and approving what was to be placed in the library.

A Well, I was aware of the minutes, you know, the minutes that we have that the clerk takes that were to be placed in the library. That's all I know.

Q Okay. At the time that you voted for this motion, why did you vote for it?

A To – I understood it was a – it was an interruption – that the clerk was getting quite a few interruptions when they passed this material out to the people that wanted to see it.

Q The clerk was passing material out to the public?

A To the people that asked for the material.

Q What material was the clerk passing out?

A Well, people – people that have a right to see the minutes. She kept the minute book, the council meetings and so forth.

Q Well, you're talking about minutes of the city council meeting?

A Yes.

Q Did she pass out any of the material that was placed in the library to members of the public that you know of?

A I don't know.

Q Why did you want this material placed in the library? Why did you yourself vote to place the material

concerning the Federal case in the public library of the (p. 8) City of Westport?

A Uh, because of the interruption it caused to our personnel in the main office which we were cramped then.

Q Would you tell me what interruption you're referring to?

A Getting – getting the material – I don't know. I – this is what the – the clerk had informed the council that evening.

Q Who was the clerk?

A Marilyn Krine (phonetic).

Q And she had informed the council – Could you tell us exactly what she informed the council that evening about this case

A That it took quite a bit of time and there was interruptions within the office.

Q What was she doing that took time?

A I don't know.

Q Did you intend that all correspondence between the attorney and Mr. Regan be placed in the library along with the other material?

A I don't know that.

Q There was a discussion before the motion was passed?

A Whether it was legal.

Q Okay. And was there any inquiry made to anyone regarding whether it was legal or not

A The mayor turned to the city attorney and asked if it

* * *

APPENDIX V

* * *

(p.3) councilman?

A Yes, '76 to '80.

Q In 1980, were you elected or appointed Mayor of the city of Westport?

A I was elected.

Q So you have been councilman from 1976 to what date in 1980?

A Uh, it would be December 31st, 1979, I believe is the way they run the calendars.

Q Then on that date, you became –

A January 1st, I became Mayor.

Q I see.

A Nineteen eighty.

Q And you were a member of the city council on September 24 of 1979?

A Yes.

Q At that time, do you recall a motion being made by someone who was a member of the city council for the purpose of placing certain material in the library which material involved a Federal lawsuit brought by Mr. and Mrs. LaMon against Chief Regan?

A Yes, I remember that.

Q And could you tell us what your memory of the motion is?

A There had been considerable curiosity and interest and inquiries in city hall regarding the total matter over – (p.4) it was extended over a period of years, and the – I'm trying to remember – as far as the motion is concerned, the clerk had mentioned that due to the questions in City Hall and the time consuming that if it could be placed – I'm not sure whether the City Clerk made this statement – but to have available to the public if they wanted to see these in the library.

Q Okay. And when you're referring to these, what are you talking about?

A The documents, the – the letters that were sent to the Police Department, letters that were sent to City Hall, letters that were sent out of City Hall, perhaps letters from Attorney Krause, all matters, I would say, pertinent to the case.

Q And did you vote for that motion?

A It was unanimous; everyone voted for the motion.

Q Who made the motion? Was it Mr. Bledsoe?

A I believe it was Gleyn Bledsoe that made the motion.

Q And you seconded the motion; is that correct?

A That's correct.

Q Now, was there a discussion of this motion before it was passed or made?

A I believe so.

Q And did anybody indicate that the clerk could tell the public that there was a public file in the federal

* * *

(p. 19) Q So the answer is yes?

A Yes.

Q Thank you.

Now, I'm showing you Exhibit No. 1, and those are copies of the official records of the city. Can you confirm that statement for the benefit of this deposition?

MR. SOHA: I've seen these already.

A That's regular course of business.

Q (By Mr. Burtch) Is that copies of the official records of the –

A I would say so.

MR. BURTCH: I would like to have this made part of the deposition.

MR. SOHA: Is this Exhibit 2 to the deposition?

MR. BURTCH: You can make them – let's go off the record.

(Discussion held off the record)

(Deposition Exhibit No. 1 from Cheryl Ahern Deposition was remarked Deposition Exhibit No. 2 to this Deposition)

Q (By Mr. Burtch) Mr. Engle, over a period of time, would you say that you had developed ill will against Mr. and Mrs. LaMon?

A That's kind of an unusual question.

(p. 20) Q If you don't understand the question. I'll try to rephrase it.

A Do you think I should – How do you think I should feel towards – let you answer the question.

The object here is for you to answer the question, Mr. Engle, not me.

A Well, let me say that I do not hold them in high esteem.

Q Okay. And would you agree that you did not hold them in high esteem when you voted to put this material in the library, in the public library, of Westport?

Q Would you agree that also that you went as far as to state to a Deputy Welbaum that in your opinion that the LaMons should get out of town?

A No.

Q You deny making that statement?

A Correct.

Q Do you know when Mr. Bledsoe actually moved to Cheney from Westport?

A I believe it was before the end of last year.

Q Was it before August 14 of 1981?

A I'm not sure.

Q How did you know that he had moved? How did you find out?

A He sent a letter of resignation to the city council.

Q Do you know when that letter was dated?

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No. 89-961

In The

Supreme Court of the United States

October Term, 1989

EDWARD LaMON AND LORRAINE LaMON,

Petitioners,

vs.

CITY OF WESTPORT, A MUNICIPAL CORPORATION; BILL WADE, JR., AND JANE DOE WADE, HIS WIFE; ORVILLE ENGLE AND JANE DOE ENGLE, HIS WIFE; FRANK SCHNIDER AND JANE DOE SCHNIDER, HIS WIFE; GARY PEDERSON AND JANE DOE PEDERSON, HIS WIFE; CHERYL AHERN AND JOHN DOE AHERN, HER HUSBAND; GLEYN BLEDSOE AND JANE DOE BLEDSOE, HIS WIFE; AND JOHN J. REGAN AND MABLE REGAN, HIS WIFE;

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. JURISDICTION

The Supreme Court lacks jurisdiction in this action. Petitioners failed to plead their present contentions before any Washington state tribunal, and the underlying opinion for review, *LaMon v. Westport*, 44 Wash. App. 664, 723 P.2d 470 (1986), dealt with and was decided exclusively on state law. Thus, there is no "federal question" jurisdiction and certiorari is inappropriate. 28 U.S.C. § 1257 (1982 & Supp. III 1989).

II. STATEMENT OF THE CASE

On July 3, 1980, petitioners brought the present action for defamation and invasion of privacy against the City of Westport, the members of the Westport city council, and the Westport police chief, John Regan. The suit was filed in state court and alleges only state law causes of action. The action is based on respondents placing allegedly defamatory material in the Westport public library. The material related to an earlier federal district court lawsuit involving petitioners and the police chief Regan.

In the earlier suit, petitioners claimed that Regan denied them equal protection and that he falsely arrested and maliciously prosecuted them. The suit was brought during a lapse in the city's insurance, and because the suit was brought against Regan in his official capacity, the city decided to finance Chief Regan's legal fees. Following a 1978 federal judgment against Regan on the equal protection claim, the Westport city council continued to finance Regan's attorney's fees on appeal and agreed to

post an appeal bond. In addition, the city council decided to place in the public library a large file of materials from the federal litigation so that interested citizens could see for themselves the justification for the expenditure of municipal funds. The council contacted petitioners so that they could include documents of their choice in the file. Petitioners, however, declined.

The file placed in the public library totaled 505 pages and included: appellate briefs; trial memoranda and briefs; court orders; findings and conclusions of the federal district court; various correspondence; trial transcripts; interrogatories and answers to interrogatories; and police investigation reports introduced into evidence at trial. The file was kept on a shelf under the checkout desk and was accessible to the public only through the librarian or her staff. Throughout the proceedings before the trial court in this case, petitioners were unable to specifically identify any person who requested and actually reviewed the contents of the file in the Westport library.

Petitioners brought this state court suit in July, 1980. At the trial level, respondents moved for summary judgment, contending that as a matter of law there was no evidence regarding publication. The motion was denied. Respondents filed a second motion for summary judgment on the basis that the designated file materials would not, as a matter of law, support an action for defamation or invasion of privacy. The trial court granted the second motion and dismissed the case with prejudice.

Petitioners appealed to the Washington Court of Appeals. The court, in a July 31, 1986 opinion, affirmed

the dismissal of the suit, finding that the lack of publication defeated petitioners' claims. Petitioners then petitioned for review of the decision to the Supreme Court for the State of Washington. Review was denied by that Court on June 6, 1989.

III. OPPOSITION TO CERTIORARI

A. LACK OF FEDERAL QUESTION JURISDICTION.

1. Introduction.

Supreme Court review by way of writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. RSCUS 17. Petitioners have argued that certiorari, based upon alleged violations of the Fourteenth and Seventh Amendments of the Constitution and their constitutionally protected right of privacy, is proper in this case. As a prerequisite for review, the court must have "federal question" jurisdiction over the state action. The highest court in the State of Washington must have decided a federal question in a way that conflicted with the decision of another state or federal court or the Constitution, questioned the validity of a statute of the state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or reviewed a right or privilege specially set up or claimed under the Constitution, treaties or statutes of the United States. RSCUS 17.1(a)(b), 28 U.S.C. § 1257. Such grounds for jurisdiction are nonexistent in petitioners' Petition for Writ of Certiorari. No federal question was ever brought before or decided by a Washington state tribunal. Certiorari is thus

inappropriate in this instance. *See Webb v. Webb*, 451 U.S. 493, 495-97, 101 S. Ct. 1889, 1891-94, 68 L. Ed. 2d 392, 395-97 (1981); 28 U.S.C. § 1257.

2. Failure To Plead Federal Issues Before A State Court.

Supreme Court review over final state court decisions may be had only when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims. . . ." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13, 103 S. Ct. 2841, 2848, 77 L. Ed. 2d 420, 433 (1983). Jurisdiction of the Supreme Court to reexamine the final judgment of a state court can only arise if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb*, 451 U.S. at 496-97, 101 S. Ct. at 1891-92, 68 L. Ed. 2d at 396-97. The federal question must have been raised in a proper and timely manner in the state courts. *Id.* 451 U.S. at 501, 101 S. Ct. at 1894, 68 L. Ed. 2d at 399-400; *see Street v. New York*, 394 U.S. 576, 581-85, 89 S. Ct. 1354, 1360-62, 22 L. Ed. 2d 572, 579-80 (1969); *Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L. Ed. 184, 187 (1928). Failure to do so precludes Supreme Court review of the issue. *Street*, 394 U.S. at 582, 89 S. Ct. at 1360, 22 L. Ed. 2d at 579.

Petitioners listed the following issues for review on certiorari:

> I. Does the Fourteenth Amendment to the United States Constitution provide procedural and/or substantive due process protection for a person's "good name and

reputation" from the intentional dissemination of false and private information by the placing of such information in the City Library by the municipal corporation?

II. Does the Fourteenth Amendment to the United States Constitution protect a litigant in State Court on both the trial and appellate level from arbitrary adjudicative procedures?

III. Was petitioner [sic] deprived of a constitutionally protected right of privacy when the City of Westport placed defamatory and private material concerning them in the Westport City Library?

Petitioners never pleaded these federal arguments before any state tribunal. In their Rule 21.1(h) Statement specifying the stage of proceedings in the state court in which the "federal questions sought to be reviewed were raised," RSCUS 21.1(h), petitioners noted: "[t]he Seventh Amendment right to a jury trial was raised in petitioners' Petition for Review to the Washington State Supreme Court. Appendix F, App. 89-95." Contrary to petitioners' assertions, no Seventh Amendment right to a jury trial was ever inferred or raised in that proceeding. A review of petitioners' Appendix F reveals no reference or statement to the Seventh Amendment or any violation of petitioners' constitutional right to a jury trial. Indeed, petitioners' only inference to such a right was a single sentence referring to the Washington State Constitution: "[f]aith in the people is essential to democracy. That is why our state constitution provides that the right of trial by jury shall remain inviolate. *WN. State Const. Art. 1 § 21.*"

Petitioners failed to bring their presently alleged Seventh Amendment claims before the state forum and thus are precluded from bringing similar arguments before the United States Supreme Court. *Webb*, 451 U.S. at 501, 502, 101 S. Ct. at 1894, 68 L. Ed. 2d at 400.

Petitioners' Fourteenth Amendment claims are similarly defective. Turning again to their Rule 21.1(h) statement, petitioners represent that "[t]he Fourteenth Amendment due process clause was raised in the Motion to Reconsider to the Court of Appeals. Appendix G, App. 96-99. It was also raised in the Petition for Review to the Washington State Supreme Court. Appendix F, App. 89-95 inclusive." In their Motion to Reconsider in the Washington Court of Appeals, petitioners' Appendix G, petitioners stated the following:

> This court in its appeal applied the usual rules of summary judgment. It assumed for the purpose of appeal that the LaMONS met their burden regarding a defamatory and false statement, found that the publication was unprivileged, but ruled against the LaMONS on an issue which was not rightfully before the court, to wit, publication.
>
> At oral argument, the attorney for the appellant pointed out to the court that there had not been a cross appeal by the defendant's in this action, and that he did not feel that publication was an issue before the court. The attorney at that time indicated to the court that if they thought there was an issue on publication before the court that the records should be supplemented regarding this, and asked for the opportunity to address it in a supplemental brief.

* * *

> In this case the court did not have all the matters before it regarding publication when it ruled regarding this issue in its opinion. This is unfair not only to the trial court, but to the appellants.

Beyond arguing "unfairness," petitioners never asserted nor inferred a Fourteenth Amendment denial of due process. Petitioners' arguments centered on the issue of whether the court should have considered the publication issue. Similarly, in their Petition for Review to the Washington State Supreme Court, petitioners debated whether the appellate court should have considered publication in its decision and whether a party, in answering a motion for summary judgment, has a right to rely on the specific issues raised in the motion. Again, no Fourteenth Amendment right to due process was ever asserted. Because petitioners neglected to bring their present arguments before any state forum, certiorari should not be granted. *Webb*, 493 U.S. at 501, 502, 101 S. Ct. at 1894, 68 L. Ed. 2d at 400.

3. The Underlying Appeal Was Decided Under State Law.

Notwithstanding petitioners' failure to plead their federal contentions in the state court system, certiorari would nevertheless be inappropriate since the opinion in *LaMon v. Westport*, 44 Wash. App. 664, 723 P.2d 470 (1986)[1]

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[1] Since the Washington State Supreme Court denied review of the underlying action, the Washington Court of Appeals' decision stands as the substantive basis for petitioners' claims for certiorari review.

did not present grounds upon which federal question jurisdiction would arise. The case dealt with state issues and was decided on state law.[2]

The court in *LaMon* primarily discussed the necessity of publication as an element of defamation in the State of Washington, whether publication existed, and whether lack of publication was dispositive of not only defamation claims, but also invasion of privacy claims. Relying exclusively on state grounds, the court found that, "[t]he circumstances here do not support the inference that a publication occurred," and dismissed petitioners' defamation claims. *LaMon*, 723 P.2d at 473. In like fashion the court denied petitioners' claims for invasion of privacy, holding that "false light publicity requires *publicity* of the falsehood. . . ." *Id.* at 474. Petitioners' invasion of privacy claims based on the unreasonable intrusion upon their private affairs were disposed of with the statement that "[t]he LaMons have not explained what private affairs were intruded upon . . . much of the material in the file is a matter of public record . . . " *Id.*

State courts speak with final authority on questions of state law. *E.g., Mullaney v. Wilbur*, 421 U.S. 684, 691, 95

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[2] The only reference to federal law in the entire *LaMon* opinion was a footnote discussing the rules used with summary judgment. FRCP 56 and Washington's CR 56 are substantially similar. The reference was provided as guidance and had no bearing on the court's final determination. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201, 1214 (1983). A mere reference to federal law in a state cause of action does not automatically confer federal question jurisdiction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813, 106 S. Ct. 3229, 3234, 92 L. Ed. 2d 650, 661 (1986).

S. Ct. 1881, 1886, 44 L. Ed. 2d 508, 515 (1975). The court in *LaMon* relied exclusively on Washington law to resolve the issues presented by petitioners at the state level. There is no Supreme Court review of a state decision that relies on adequate and exclusive state grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-42, 103 S. Ct. 3469, 3476-77, 77 L. Ed. 2d 1201, 1214-15 (1983); *Webb*, 451 U.S. at 500, 501, 101 S. Ct. at 1894, 68 L. Ed. 2d at 399. Since a federal question was neither raised by petitioners nor discussed in the state forum, Supreme Court review by way of writ of certiorari is thus improper. *Id.*, 451 U.S. at 501, 502, 101 S. Ct. at 1894, 68 L. Ed. 2d at 400.

B. No Constitutional Right Was Infringed.

No constitutional right was infringed on appeal in this case. Petitioners allege, in unclear terms, that certiorari is proper based upon the Washington Court of Appeals' "unfair" treatment of their case. Petitioners hold that since there was "no cross-appeal by the defendants," the issue of publication was not "before the court" and thus it was "unfair" for the court to affirm on that issue. (Petition at 8). No authority is cited by petitioners for the proposition that a cross-appeal was necessary to review the publication issue.

No such authority exists. It is a fundamental axiom of appellate review that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S. Ct. 1153, 1156, 25 L. Ed. 2d 491, 496 (1970) (citations omitted). Furthermore,

cross-appeal by the prevailing party is not necessary for appellate court review. As noted in *Dandridge*:

> [I]t is likewise well settled that the appellee may *without taking a cross-appeal*, urge in support of the decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon the matters overlooked or ignored by it.

Id. (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36, 44 S. Ct. 560, 564, 68 L. Ed. 2d 1087, 1093 (1924)) (emphasis added); *see also Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S. Ct. 307, 308-309, 1 L. Ed. 2d 314, 315 (1957).

Appellate review is not restricted by the trial court's reasoning. "Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its actions." *J.E. Riley Inv. Co. v. Commissioner*, 311 U.S. 55, 59, 61 S. Ct. 95, 97, 85 L. Ed. 36, 40 (1940). *See Burns v. Miller*, 107 Wash. 2d 778, 780, 733 P.2d 522, 524 (1987) (trial court can be affirmed on any proper basis within the pleadings and the proof); *Haberman v. Elledge*, 42 Wash. App. 744, 748, 713 P.2d 746, 748 (1986) (correct judgment will not be reversed on appeal where it can be sustained on any theory, even on a theory not relied on by the trial court).

In the present case, respondents moved for summary judgment at the trial level on two separate grounds: lack of publication and lack of a defamatory statement. The court rejected the one ground, but granted summary judgment on the other, dismissing the entire action with prejudice. On appeal, the Washington Court of Appeals

applied the above stated axioms and reviewed both issues, as was proper. No cross-appeal by respondent was necessary. Finding the lower court decision to be correct, the court upheld the decision on one of the grounds urged below.

The court of appeals' decision to sustain the summary judgment on the lack of publication did not deny petitioners their due process rights. The entire appeal was conducted within the bounds of law and procedure. No unfairness existed in the appellate proceedings. Petitioners' ignorance of appellate practice and procedure does not constitute a violation of due process. Petitioners' constitutional rights were not infringed and thus no grounds exist for this court's review by way of certiorari.

IV. CONCLUSION

Certiorari review is inappropriate in this case. Petitioners not only failed to bring the issues pleaded in their Petition for Writ of Certiorari before the Washington court system, but the underlying opinion for review, *LaMon v. Westport*, 44 Wash. App. 664, 723 P.2d 470 (1986), addressed state law issues and was decided on state grounds. Their presently asserted constitutional claims substantively derive from their failure to properly identify disputed questions of material fact so as to defeat summary judgment at the trial court level, and procedurally derive from their failure to appreciate and comply with basic appellate procedure. For the foregoing reasons, this court is requested to deny petitioners' Petition for Writ of Certiorari.

DATED this 19th day of January, 1990.

Respectfully submitted,

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I. JURISDICTION

The statement contained in the Petition for Writ of Certiorari to the Supreme Court of the State of Washington regarding jurisdiction remains the same, except that reference should also be made to the Supreme Court Rules Rule 17 regarding considerations governing review on certiorari.

II. STATEMENT OF THE CASE

Petitioner's believe that the statement of the case set forth in their petition accurately sets forth the background regarding their claim that their due process rights under the United States Constitution were violated by arbitrary adjudicative procedures in the state trial court and appellate courts. It is submitted that the record in the state court shows clearly that the Court of Appeals ignored its own rules regarding (1) the necessity of having a complete record before it in making a decision, and (2) what issues were properly before it.

These rules are cited in the Petition for Certiorari, and were obviously designed to guarantee due process both under the federal constitution and the state constitution. The fact that the record before the Court of Appeals regarding publication was incomplete was brought to the attention of the court in oral argument and request was made that the record be completed if the court was to consider the issue of publication. It was also pointed out to the appellate court that the issue of publication under its own rules and decisions was not properly before the

court and therefore had not been addressed by petitioners in their brief.

The Washington Supreme Court has ruled that in appeals governed by the Rules of Appellate Procedure, a trial court is required to certify those matters relied on in ruling on a motion for summary judgment. *Millikan vs. Board of Directors*, 92 Wn.2d 213, 595 P.2d 533 (1979). In that case the court stated on page 215 as follows:

> The reason is obvious: it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We must have before us the precise record – no more and no less – considered by the trial court.

A decision based upon an incomplete trial record is obviously a denial of fairness, i.e. due process. The petitioners were never given notice that the appellate court would ignore its own rules and decide the case on an issue not properly before the court on review, and an issue where the record before them was incomplete.

Although the appellate court gave no explanation why it made a decision contrary to its own rules, it necessarily in making such a decision violated the Fourteenth Amendment due process rights of petitioners.

After the decision was issued by the Court of Appeals, petitioners moved the court to reconsider its decision and again pointed out that the decision was based upon an incomplete record regarding this issue and was contrary to its own rules of appeal. See App. 1 through 3 inclusive.

The Court of Appeals denied petitioner's motion for rehearing and petitioners then petitioned for review of

that decision by the Washington State Supreme Court. In this petition the issue of Fourteenth Amendment due process violations was clearly raised by petitioners.

In a footnote in respondent's Brief in Opposition to Petition for Writ of Certiorari, respondents state:

> Since the Washington State Supreme Court denied review of the underlying action, the Washington Court of Appeals' decision stands as the substantive basis for petitioners' claims for certiorari review.

No legal authority for this position is given, and indeed it is totally illogical. There is no final decision by the state courts until the Washington State Supreme Court denies review. The Petition for Review and denial are part of the state court records.

III. OPPOSITION TO CERTIORARI

The issue regarding jurisdiction which is the basis for petitioners' Petition for Certiorari is the state court's violation of petitioners' United States Constitutional right to fairness or due process, as guaranteed in the Fourteenth Amendment of the United States Constitution. The record in this case also shows that the petitioners' right to a jury trial was violated. It is submitted that the Seventh Amendment guarantee of a jury trial should be incorporated in the Fourteenth Amendment.

While the record must show that an issue under the United States Constitution or Code was necessarily raised before the state courts, the modern view is that it is not essential that a particular provision of the Constitution or

Code be specifically pointed out,[1] set out verbatim,[2] or cited.[3]

A decision in terms of a federal question on the state level is not essential; if the decision of the federal question was necessarily involved in the judgment rendered, it is not a matter of importance that a state court avoided all reference to the question. *Chapman vs. Goodnow's Admr.*, (1887) 123 U.S. 540, 31 L. Ed. 235, 8 S. Ct. 211; *Bell's G. R. Co. vs. Pennsylvania*, (1890) 134 U.S. 232, 33 L. Ed. 892, 10 S. Ct. 533; *Chicago, B. & Q. R. Co. vs. Chicago*, (1897) 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581.

State procedural rulings cannot be found to be independent of a claim that the procedural rulings themselves cause a denial of due process. See *Saunders vs. Shaw*, (1917) 37 S. Ct. 638, 244 U.S. 317, 61 L. Ed. 1163. In the enforcement of state rights as well as federal rights, state procedure can never be independent of the requirements of due process. There should be Supreme Court jurisdiction to review a state decision that refused consideration of any claim, state or federal, on procedural grounds that fell below due process requirements. See Federal Practice and Procedure, Wright, Miller, Cooper and Gressman (Jurisdiction and Related Matters § 4025).

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[1] *Spencer vs. Merchant*, 125 U.S. 345, 31 L. Ed. 763, 8 Sup. Ct. 921; *Bridge Proprietors vs. Hoboken and Co.*, 68 U.S. 116, 17 L. Ed. 571.

[2] *Furman vs. Nichol*, 75 U.S. 44, 19 L. Ed. 370.

[3] *Copperweld Steel Co. vs. Industrial Com. of Ohio*, 324 U.S. 780, 89 L. Ed. 1363, 65 S. Ct. 1006.

No issue is taken by petitioners with that line of cases that say that a prevailing party may assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.

Such an argument is irrelevant. The decision appealed from was the granting of summary judgment on the defendant's motion for summary judgment on the basis that as a matter of law, the designated file materials would not support an action for defamation and/or invasion of privacy. The trial court failed to indicate the basis upon which summary judgment of this motion was granted. It certainly was reasonable to assume that since the trial court had denied the defendant's motion on summary judgment due to lack of publication, that the second motion was granted on different grounds. The failure of the trial court to indicate the basis upon which summary judgment was granted is unfair and violative of 14th amendment rights. *Williams vs. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986); *Fairfield Scientific Corp. vs. U.S*, 611 F.2d 854 (1978).

IV. CONCLUSION

The arbitrary adjudicative procedures in both the trial and appellate courts of Washington State, violated the due process rights of petitioners, and the Supreme Court has jurisdiction to consider the issue.

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Respectfullly submitted,

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APPENDIX A

* * *

the certificate is there any reference to any depositions as being considered by the court in ruling on the motion on summary judgment where it granted summary judgment to the defendants on their second motion for summary judgment.

This court in its appeal applied the usual rules of summary judgment. It assumed for the purpose of the appeal that the LaMONS met their burden regarding a defamatory and false statement, found that the publication was unprivileged, but ruled against the LaMONS on an issue which was not rightfully before the court, to wit, publication.

At the oral argument, the attorney for the appellants pointed out to the court that there had not been a cross appeal by the defendants in this action, and that he did not feel that publication was an issue before the court. The attorney at that time indicated to the court that if they thought there was an issue on publication before the court that the records should be supplemented regarding this, and asked for the opportunity to address it in a supplemental brief.

* * *

summary judgment regarding publication brought by the defendants, then the court would have had to have the record identified with particularity by the judge who ruled on that motion. As stated in *Millikan vs. Board of Directors*, 92 Wn.2d 213, 595 P.2d 533 (1979), on page 214 as follows, to wit:

> "The Court of Appeals applied the rule of *American Universal Ins. Co. vs. Ranson*, 59 Wn.2d 811, 370 P.2d 867 (1962). There, at page 816, we explained the manner of and reason for specifying on appeal the matters considered in ruling on a motion for summary judgment:
>
> > "First, they may be incorporated in a statement of facts certified by the trial courts; second they maybe identified with particularity in the summary judgment signed by the trial court and then furnished to this court by transcripts certified by the clerk of the court. The reason is obvious: it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We must have before us the precise record – no more and no less – considered by the trial court."

In this case the court did not have all the matters before it regarding publication when it ruled regarding this issue in its opinion. This is unfair not only to the trial court, but to the appellants.

* * *

(f) of that rule states that all pleadings shall be so construed as to do substantial justice.

The purpose of this rule and its coordinate rules is to permit the merits of the case to be reached no matter how inept counsel may have been in the pleading stages of the controversy. The change in terminology emphasizes the fact that it is no longer necessary to state a "cause of action"; it is sufficient to make a short "statement of the claim showing the pleader is entitled to relief." *Original Ballet Russe vs. Ballet Theater*, (CCA.2d 1943) 133 Fed.2d 187, 189.

In conclusion, it is believed the court wrongfully considered the issue of publication in this appeal. Furthermore, if the court was going to consider the issue of publication, it should have had a proper record before it for this consideration. Finally, it is not necessary in Washington pleading to assert causes of action.

Since the husband and wife are separate legal entities, they are each parties when they assert separate causes of action no matter how inartfully done, and they are each entitled to

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